Office-Supreme Court, U. S.
FILED
OCT 14 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 359

PATRICK J. McHUGH, AUSTIN J. POWERS, ALPHONSE F. HAYES, GEORGE H. HODSDON, JOHN G. SPARROW, JOHN CALDER, NORMAND LAJOIE AND LEO F. BARRETT, AS THEY ARE OFFICERS AND MEMBERS OF THE ATLANTIC FISHERMEN'S UNION,

Petitioners,

vs.

COMMONWEALTH OF MASSACHUSETTS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS, AND BRIEF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 359

PATRICK J. McHUGH, AUSTIN J. POWERS, ALPHONSE F. HAYES, GEORGE H. HODSDON, JOHN G. SPARROW, JOHN CALDER, NORMAND LAJOIE AND LEO F. BARRETT, AS THEY ARE OFFICERS AND MEMBERS OF THE ATLANTIC FISHERMEN'S UNION,

Petitioners,

vs.

COMMONWEALTH OF MASSACHUSETTS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Patrick J. McHugh, Austin J. Power, Alphonse F. Hayes, George H. Hodsdon, John G. Sparrow, John Calder, John A. Muise, Normand Lajoie and Leo F.

Barrett, as they are officers and members of the Atlantic Fishermen's Union, in behalf of themselves and all other officers and members of the said Atlantic Fishermen's Union, pray that a Writ of Certiorari issue to review the final decrees of the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, entered on October 9, 1950, after Rescript of the Supreme Judicial Court for the Commonwealth of Massachusetts issued on July 7, 1950. On application of the petitioners they were, on September 30, 1950, granted an extension of time up to and including October 15, 1950, in which to file this petition in this Court, provided that notice of such extension be given to the Attorney General for the Commonwealth. Notice was forthwith given as ordered. The Final Decrees after Rescript have been stayed by the Superior Court.

The proceedings were commenced in the Superior Court for the County of Suffolk against the petitioners by an action brought by the Attorney General for the Commonwealth of Massachusetts in the name of the Commonwealth under Massachusetts Gen. Laws (Ter. Ed.) c. 93, sec. 3, against the officers and members of the Atlantic Fishermen's Union, a voluntary association, to restrain the defendants from continuing certain "acts, arrangements, combinations and practices" described in the Bill of Complaint and alleged to be in violation of the Common Law and of said Chapter 93, Section 2.

The Superior Court found against your petitioners and on September 2, 1947, entered final decrees (R. p. 1768, 1770). Thereafter appeals and other proceedings in review were taken to the Supreme Judicial Court for the Commonwealth, the highest Court of the Commonwealth. Such Court affirmed, with modifications, the decrees of the Superior Court, and this petition is directed to such affirmance as finalized, after Rescript, by the Superior Court as well as the action affirming denial of the Petitions to Remove

and their remand by the U. S. District Court for the District of Massachusetts.[1] The decision below is reported in the 1950 Massachusetts Advance Sheets, at p. 947. (See also 93 N. E. (2) 751.)

Statement of Matter Involved

Bill of Complaint and Proceedings Thereunder

The Bill of Complaint alleges that by control over manpower, by production controls over catch volume, by requirement that all fish brought into the Port of Gloucester be sold through the Union selling room subject to Union rules, by refusal to sell to certain dealers, by establishment of price schedules for Boston sales, and by acts in enforcement of these arrangements and practices, the Union had unduly enhanced the price of fish (R. 1).

The petitioners herein, from the outset and throughout the proceedings in the State Courts denied the jurisdiction of the Courts of the Commonwealth. They filed petitions for removal to the U. S. District Court for the District of Massachusetts. Such petitions asserted that the matters alleged in the Bill of Complaint came within the control of Federal Law pursuant to the commerce and admiralty and maritime clauses and the Fourteenth Amendment to the Federal Constitution and the Sherman Act, the Clayton Act, the Fisheries Co-operative Marketing Act, the National Labor Relations Act and other Federal Statutes (R. 8, 32). The Superior Court denied the petitions to remove but, after exceptions taken, reported its action to the Supreme Judicial Court as "matters of jurisdiction which should be decided in the first instance." (R. 30, 55.) The petitioners presented such petitions to said U. S. District Court which remanded same. (*Commonwealth* v. *McHugh*, 71 F. S. 516.)

[1] (R. 1791.)

The petitioners filed various challenges to the jurisdiction and motions, pleas, and a demurrer further challenging the lack of state jurisdiction, asserting again existence of conflict between the state statute and aforementioned federal statutes and the Federal Constitution. Such motions, pleas, and demurrer were overruled (R. 66, 82, 93, 97, 98, 1765). A preliminary injunction was issued restraining the petitioners from "fixing prices." (R. 79, as embodied in contempt petition.) A petition for contempt of such injunction was filed, to which jurisdictional challenge was made and overruled. (R. 81, 98, 1767, 1768.) The petitioners again asserted lack of state jurisdiction and supersession of the State Statute by the Federal Statutes and the Federal Constitution,—in their answer. (R. 58.)

After trial on the merits, a Final Decree and a Final Decree on Contempt Petition were issued (R. 1768, 1770) together with an interlocutory decree again overruling the aforementioned motion, pleas, and demurrer (R. 1765). Appeals were taken (R. 1771, 1772) to the Supreme Judicial Court. A Bill of Exceptions was also filed (R. 1778). The Supreme Judicial Court on July 7, 1950, issued its Rescript affirming the Interlocutory Decree, the Final Decree with modifications, and the Final Decree on Contempt Petition. (R. 1815, 1816-17.) The Court also, on the reports made to it involving the Petitions to Remove, as remanded and otherwise, affirmed the denial of same.

The Hearings in Equity

At the hearings the following facts were developed:

A. The Union and the Fishing Industry

The Atlantic Fishermen's Union is a labor organization affiliated with the Seafarers' International Union of North America, A. F. of L. (R. 1023-24, 1746-48). It was organized as a defense against employer wage exploitation taking

daily and systematic form in under-grading of fish with price cuts to the fishermen (R. 742, 749, 763, 1051-55, 1079-82, 1656). It has administrative offices in Boston, Gloucester, New Bedford, Portland, Me., and New York City (R. 1026). It conducts selling rooms in Gloucester and in New Bedford (R. 816, 1127-8, 1402-07) set up under the Federal Fisheries Co-operative Marketing Act. (15 U. S. C. sec. 521-22.)

The Union's membership is composed solely of employee [2] fishermen and captains working in crews on enrolled vessels of U. S. Registry (R. 1075), all being over 20 tons gross (R. 767, 966, 1748), engaged in commercial deep sea fishing on the High Seas (Exh. 10 A and B, R. 1137) from Virginia to the Grand Banks off Canada (R. 1268, 1749).[3] Neither fishermen nor captains have any investment in any of the vessels. No vessel owner is eligible to, or holds membership in the Union—a fact admitted by the Commonwealth (Exh. 27, sec. 2-4, R. 1711; R. 308-26, 454, 534, 1142).

The employing vessels are owned by incorporated companies (Exh. 9 (R. 1045), 313, 335-7, 649, 1051) which predominantly are wholesale dealers who purchase "their" fish for wharfside processing (fillet cutting, freezing and canning). (R. 851, 987.) The fishermen and captains predominantly are company fishermen working on such captive or company-owned vessels (R. 1454).

The company store supplies the fishermen food, fuel oil and ice used in fishing and the charges for same are, on return of the vessel to port, deducted in the making of "trip" wage-settlement (R. 352-3, 551, 748). Indebtedness to the

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[2] This employee relation marks major differentiation between this case and *Columbia River Packers Assoc.* v. *Hinton*, 315 U. S. 147.

[3] The Massachusetts Supreme Court concealed the geographical locations of fishing operations and their nature as international fisheries, which has brought about observation that the fishing activities took place in "Commonwealth Waters," as witness headnotes in Report of Decision in 93 N.E. (2) 751.

vessel owner carries over into succeeding trips in the event of a "broker," a trip which does not net expenses—a condition particularly prevailing in Gloucester and New Bedford. (R. 352-3, 584; Exh. 27.) The fishermen pay for the supplies at the retail level and the wages are paid off in terms of the wholesale price of fish. (R. 1663.)

The vessel owner determines the broad terms and conditions of fishing operations—whether the vessel shall engage in either cod or haddock fishing (Boston), red fishing (Gloucester and Portland), flounder fishing (New Bedford), mackerel (Gloucester, Portland and New York) or other fishing.[4] The owner, by marine telephone, communicates with captains at sea relative to market conditions and port and time for return. (R. 768-71, 939, 1660.) The owner deducts from the wages of both fishermen and captains employee income taxes, social security, and unemployment insurance taxes (R. 859-63).

The fishermen work 12 hours daily on two 6-hour shifts, Sundays and holidays included, or 84 hours every 7 days; and they are subject to call for emergencies. In red fishing operations, from May to October, they frequently work 18 hours a day. The normal trip has been 10 days.

Fishermen work under a wage system whereby the wage is a share of the money realization resulting from sale of catch. It depends on size of catch volume and per pound price per species. Fishermen receive their pay from the vessel owners. The method to determine the "share" value of their labor, in terms of wage-money, takes the form of an accounting procedure known as the Lay. The Lay and some other terms and conditions of employment are worked out by collective bargaining and are reduced to Agreements (Exh. 9, 27) between Union and vessel owners (R. 1041-43).

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[4] In the ports of Boston, Gloucester and New Bedford alone, the 1946 wholesale value of landings totalled $36,116,057 (R. 1795).

The fishermen come from 16 states (R. 1032-37). They work interchangeably on enrolled U. S. vessels sailing from many Atlantic Coast states. Out-of-state vessels frequently land their catches in Massachusetts. Massachusetts vessels frequently land their catches in Maine and New York. The mackerel fleet land catches in states running up the coast from New Jersey to Maine. Such mackerel catches and frequently flounder catches brought in by the New Bedford vessels are landed outside of Massachusetts for rail and truck transport to various cities along the coast, including Massachusetts cities. (R. 204-11, 333-7, 1067-76).

In the spring of the year, in addition to the mackerel boats, about 50 vessels out of Gloucester sail for and fish in Southern waters and land catches in Middle Atlantic States (R. 1067-76). During the summer months (May to October), a large fleet of Southern boats, manned by union members other than Massachusetts residents, engage in haddock, cod and red fishing operations in Northern waters, and their catches are disposed of in Maine and Massachusetts ports. (R. 333-4.)

The Massachusetts and other fleets also fish on banks off the United States and Canada coasts and colonial possessions of France (St. Pierre and Miquelon). United States vessels fish alongside vessels of 10 foreign nations (Canada, Newfoundland, Great Britain, France, Portugal, Spain, Iceland, Denmark, Norway, and prospectively Italy). (R. 270-71, 1187-89). Resort to these foreign banks is increasingly necessary because of depletion of marine resources off United States territorial waters (R. 1269).

The dealers[5] (R. 932) introduced mechanized fishing

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[5] Ackerman, The New England Fishing Industry, Un. of Chicago Press; Receipts of Fresh and Frozen Fishery Products, 1944, C. M. Reardon, Receipts of Fishery Products in Salt Water Market—New York City, 1945, R. T. Whiteleather, both by Fish and Wildlife Service, U. S. Dept. of Interior. (V for Indentification. R. 1605.)

(beam-trawler) to the New England industry to develop mass production of a low-cost raw material (R. 797-8, 888, 969) for the national and international markets (R. 905, 931). The nature of the mass market endows the vessel-owner-dealer with major control over "supply and demand" and ex-vessel prices to their fishermen. (R. 821-29, 844, 948, 999, 1081-84.) [6] This power derives from the technology of preservation—freezing, storing, canning and other processing. The fishermen have no control over supply [7]—the fishermen rarely found it possible to meet the production goals hoped for in Union votes. (R. 282-4, 403, 447-64, 466-7, 516-59, 589-92, 722-23, 1763.) The vessel-owner-dealer can warehouse its processed fish indefinitely and thus, by inventory control, regulate the "law of supply and demand" as it works against the fishermen dockside. (R. 730, 754). The fishermen, in the face of this employer control, merely sought a support wage, and to them it is "a matter of indifference" "what buyers do with their fish." (R. 1764.)

Massachusetts dealers not only sell throughout the nation (R. 1030-33) but elsewhere in the world. The larger firms in Boston and Gloucester include General Foods Corporation, Booth Fisheries Company, Atlantic Coast Fisheries Company and Gorton-Pew Company—they (R. 214-5, 340, 649, 659, 679-91) being companies engaged in international (R. 838-42) production and distribution with production, processing and distribution facilities both in the United States and Canada. The bulk of Massachusetts

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[6] Frozen fish sales by 1941 bulked 70% of local fish industry activity. See: Defining American Fishery—Committee on Merchant Marine and Fisheries, H.R. 8475, Apr. 16, 1940, testimony of Alphen, Pres. General Seafoods Corporation, p. 46, *et seq.* U. S. Dept. of Interior, Fish and Wildlife Service, Frozen Fish Reports, 1941-47. (Exh. for Indentification, A, P, S, and V.)

[7] They did not even enforce the limitation rules in Gloucester (R. 813-4) or New Bedford.

landings are shipped out of the State. (R. 182, 214-5, 333, 650-1, 679-91, 825-32, 919, 934-5, 1073, 1605, 1606.) (See *U. S.* v. *New England Fish Exchange*, 258 F. 752 and 292 F. 511.) For instance, 90% of all red fish landed in Gloucester, the red fishing center, is shipped midwest. Such national demand has led to concentration of vessel ownership and buying power in the hands of a few dealers (R. 895, 955, 1252, Exh. 9). These dealers thereby assure themselves a sure source of supply of raw material (R. 731-2, 920-33, 952-3, 975, 1083-4, 1252, 1260-1, 1662). This power is advanced by dealer arrangements for pooled buying, one vessel owner dealer buying for "sets" of purchasers [8] to whom allocation (called "lending") is made. The members of such pools are "independent" dealers (R. 991) who by reason of lack of vessels "beg" for fish (R. 645). For instance, in Gloucester the Gorton-Pew Company, the largest fish company there, with ownership in 30 of the larger vessels (R. 715-6, 1495-1503), buys for itself and five other companies (18 there operating) and then "lends" (R. 435-8, 849, 1495-1503, 1510-1515). It buys more than 50% of all trips (R. 1503).[9]

B. Methods of "Sale" and "Wage" Determination

All vessel-owner-dealer companies "bid" and "buy" fish (R. 313, 337-8, 435-8, 670-4, 870, 975, 1081-4) on and from their own vessels. For instance, in Boston the cargo vessels, the beam trawlers, now bring to port 85% of *all* Boston landings. (R. 955.) Such trawlers are owned and operated by 9 companies who sell throughout the United States and in foreign countries. They "buy" and take for their vertically integrated fish operations 85% of *all*

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[8] *Amer. Tob. Co.* v. *U. S.*, 328 U. S. 781.

[9] Two other vessel-owning dealer companies purchase most of the balance under similar "pooled" buying (R. 1510-15). (See R. 1287.)

Boston landings. These dealers operate the majority of the 42 stores (fish stalls and processing plants) on the Boston Pier. (R. 1084-5.)

These vessel-owner dealers "buy" from themselves (Exh. 6, Art. V, R. 712) as follows (R. 670-4, 734-6, 870, 879, 919, 952-7, 1051, 1078, 1749-51): Fish are sold through the New England Fish Exchange, which is in the control of the beam trawler owner-dealers (R. 334-5, 646, 750-1). Such dealers, along with non-boat owning dealers, offer "bids" to and "buy" from "commission men," who act as sellers in an auction process, so called. (R. 736.) (Exh. 6, Art. X.) The "commission men" are salaried employees of the vessel-owner-dealers. (R. 1751.)

The commission men, on their own motion (R. 743), or on request of any vessel-owner-dealer who has bought fish, conduct "sell-overs." "Sell-overs" are a daily and systematic happening (R. 1051-5, 1079-82, 1656). The nature of the "sell-over" is this: Fish once sold at a price (R. 745) is subsequently resold two or three times at least on the claim of any buyer that the quality of the fish as it comes out of the vessel hold does not meet the requirements of "No. 1" quality. This inevitably starts a chain of wage-price cuts (R. 502, 740-2, 824-5, 945, 1087, 1656). The fish so bought is, without segregation, comingled and sold to secondary wholesalers and ultimately to the consumer without differentiation of quality or price, all as No. 1 fish at No. 1 price.

The "sell-over" system works to the disadvantage of the fishermen who have to submit in order to get "something" out of the trip (R. 551, 743, 748, 1656). To the fishermen the "tolling of the bell" marking the commencement of the sell-over is known as the "Burglar Alarm" (R. 1081).

This dealer buying power is further enhanced by their "price patterns" arising from price leadership of the large

Boston firms. This uniformly operates daily in all the ports (R. 1751).[10] (See R. 343.)

C. Post-war Labor-management Problems

During the course of the war the fishermen, on the average, achieved an annual wage income of approximately $4000. This was due to "fair and equitable" pricing under OPA Regulations, as based on average 1942 prices of fish. By January, 1947, the cost of living had soared no less than 20% over that prevailing on the expiration of price controls in May, 1946; and the cost of living had risen 68% over that prevailing in 1942 (R. 1452).

1. The Minimum Wage Policy of the Fishermen

To hold this annual wage, the fishermen, anxious about the increased cost of fishing operations and the "sell-over" (R. 282-5, 403-23, 459, 464, 516-49, 907, 1223, 1235), voted for a minimum wage-price relationship (R. 1702-4),[11] grounded on the average 1942 wage price level (R. 512-31, 1164, 1191-2, 1449-56, 1650-69). At the time, fishermen's wages were face up to other economic forces national and international in nature. With the ending of hostilities, the fishermen lost the benefit of large-scale purchases by the Armed Services (R. 354-9, 1382-3). Cold storage warehouses were plugged with holdings the highest in history (R. 729, 1314-15).[12] Canada and Iceland, on loss of their

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[10] In Gloucester and New Bedford the captains "sell" the fish to their employers and others competing with them in open bidding in the Union Selling Rooms.

[11] Exh. 21 (R. 1581) discloses 1946 average prices, depending on species, ran 15% to 70% higher than average 1942 prices. (See Stabilization Extension Act of 1944, sec. 102, Public Law 383, 78th Cong., 2d sess.)

[12] U. S. Cold Storage holdings of cod fillets in Feb. 1947 increased fivefold in comparison with Feb. 10, 1943, and increased 50% from Feb. 1946. On Jan. 1, 1948, red fish holdings totalled 142 odd million; on Jan. 1, 1947, it was approximately 153 million (Frozen Fish Reports, Fish and Wildlife Service, U. S. Dept. of Interior; Exh. V for Identification.)

markets in Great Britain, turned to the United States for support of their fishing economy (R. 727). Also, the cessation of the war had led to marked expansion of production facilities. Many new vessels (R. 645, 983, 1239, 1295-7) were added to the fleet. (R. 1327).

2. Low-wage Competition of Foreign Exporting Countries

Foreign fish imports from Canada and Iceland rose tremendously (R. 214-5, 340, 498, 644, 653-9, 679-706, 946-7, 1355-7).[13] Canadian exports to the middle west, the chief market for New England fish, rose roughly to one-third of the New England landings, a volume greater than the total Massachusetts production. The production costs of foreign fish were lower [14] in that, among other factors, fishing banks off Canada and Iceland were closer to their points of landing (R. 1318-22).

The consequent price competition [15] brought about price collapse, especially in the Gloucester red fish industry. Prices in all New England ports of landing were not determined by either fresh (R. 947-8) or warehouse supply but rather by the international price competition in the midwest markets. (R. 639, 833, 839, 947, 1355, 1382.) New England fish, as wheat, was now competing in a world mar-

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[13] Dominion cod exports to the U. S. in 1946 alone were equivalent to approximately 61 millions of fresh cod. Cod landings in Massachusetts ports totalled about 76 million. (Trade of Canada Exports, Dept. of Trade and Commerce, Dec. 1946; Production Statistics, Fish and Wildlife Service, U. S. Dept. of Interior).

[14] "The Price reductions that had to be made to widen the American market reflected themselves in the low standard of living to which the Canadian fishermen became increasingly subject. In the milieu that existed, labor could be made to bear the incidence of low prices." Report on Canadian Atlantic Sea-Fisheries, D. Bates, Deputy Minister of Fisheries, Royal Comm. on Provincial Development and Rehabilitation (1945).

[15] See Extension of Reciprocal Trade Agreements Act Hearings, Senate Committee on Finance, 81st Cong., 1st ses., Part I, Feb. 1949.

ket and such international price forces operated daily in the local ports (R. 687, 691, 832).

3. The Need for Conservation of Marine Resources: Job Preservation

Production under War stimulus had led to intense overfishing—the yield noticeably diminished (R. 506-23, 1099-1112, 1210-32). Both the Federal Government and the Atlantic States Marine Fisheries Commission in which the Commonwealth held membership, urged upon the fishermen the need for conservation [16] (R. 692-5, 1328-42, 1649-52, 1695), even despite the War Effort.

The Union, since its formation in 1937, had championed conservation of marine resources. It unilaterally sought to conserve fish stocks by planned production. But vessel owners refused to adopt conservation recommendations of the Department of Interior (R. 1295-1326, 1383-5). On refusal, the fishermen appealed to Congress for a "treaty" for national and international regulation of the North Atlantic Fisheries (R. 1639-49). Congress not acting, the Union undertook its own plan in the grounds normally resorted to off the American coast and based it on the experiences of the Pacific Halibut Industry.[17] Here no foreign vessels fished and the plan could not be interfered with.[18] Its plan would tend to avoid need to travel to the Grand Banks with all the increased outlay for food, fuel and ice attendant upon longer distances.[19] The fishermen undertook shorter but more frequent trips, for thereby the fish would

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[16] Fishery Compact Hearings before Committee on Merchant Marine and Fisheries, H. of R., 77th Cong., 2d sess.—H.R. 6020, Feb. 1942.

[17] Pacific Halibut Fishery Regulations, Feb. 1943, of the International Fisheries Commission; Tomasevich, International Agreements on Conservation of Marine Resources. (R. 648, 692-5, 1284-6, 1411.)

[18] 80% of landings here originate (R. 1271-80).

[19] R. 1414.

come into port in a fresher state, thus helping to meet the force of foreign competition (R. 1338-42).

The Union also adopted a trip production plan, or job-load standard for peace time based on average trip performance developed under war stimulus (R. 1697-1701). Once reached, the vessel returns to port, or in any event, by nine days. It hoped that steadiness of market flow (R. 1409, 1650-1) would result; and the more frequent trips and better quality of product would tend to assure maintenance of the annual wage achieved and more time at home.[20]

4. The Labor Controversies: The Wage Cuts

To the employers, this plan, coupled with a support or minimum wage pay-off standard meant challenge, first, to management's policy to continue exploitation of the fishing banks, and second, to management's use of the "sell-over" to juggle prices and wages. Third, the support or minimum wage would likewise make competition with Canadian and other foreign competition (R. 777, 946) more difficult. To meet such competition there were two ways out—first, to shift the cost of such competition to the fishermen by cutting their ex-vessel prices, and thus their wages (R. 707-8), or second, to cut profits by reduction of dealer margin. This led to flare-ups, at first in Gloucester and later in Boston. In Gloucester a way out was to cut the price of red fish from 4 to 2 cents to meet Canadian price levels (R. 706-9, 777-9, 834-9, 850, 947). In aid of this purpose, a change in the 5% weighing-out rule, introduced in 1937 by the dealers prior to Union organization (R. 844-5) was to be imposed. This rule permitted deduction from gross weight

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[20] While the Court speaks of "intentional limitation of production", the record is completely bare of fact of actual shortage in any way resulting from fishermen's production regulation. The Records of Massachusetts Landings for the period 1940-47 as compiled by the U. S. Dept. of Interior through its Fish and Wildlife Service show the hollowness of this unsubstantiated finding. (*Muller* v. *Oregon,* 208 U. S. 412—Courts resort to evidence aliunde.)

of red fish of 5% thereof for ice and "trash", irrespective of presence or absence of ice or trash (R. 846, 1440-42). For years the dealers had sought to change this rule, but the Union had refused to accede (R. 1757). Gorton-Pew, faced with large inventory losses (R. 322-4, 362-9, 494-8, 706-9, 755-7, 777-83, 849-54, 944-5, 1317, 1354-69), and without consultation with the Union, the recognized collective bargaining agent for the fishermen, sought to shift the market squeeze. It installed a new weighing rule operating to cut wages. This started on three vessels, two of which were owned by the company. The rule was to deduct for all alleged ice and trash content. In this instance there was no weighing out of the entire catch; only a sampling of several boxes of fish was used and then a 15% over-all deduction was made. The crews objected to the short-weighing and failure to receive full wages. They refused to sail for Gorton-Pew.

If Gorton-Pew's new rule prevailed, it would affect not only the fishermen employed on the three vessels but all the fishermen in Gloucester for time to come. (R. 1447.) This was "labor trouble" under the Union agreement with Gorton-Pew (Exh. 27, R. 1711). For a few weeks the Union declined to afford the facilities of the selling room to Gorton-Pew (R. 356, 1447).[21] Its bids were not accepted.

In Boston, on February 19, 1947, vessel-owner-dealers offered their "commission men" prices 20% to 30% lower than those previously prevailing. This was the beginning of the normal Lenten season when demand and price usually rose. (R. 936-9.) The supply on hand was actually "small." (R. 940.) These price cuts fell in with the common knowledge among dealers that the Bill of Complaint was to be filed. (R. 356, 371, 489-91, 775, 944.)

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[21] Such a weighing out rule is a wage measurement device in industries where wages are paid in terms of quantity and quality of produce. (Pound, Liberty of Contract, 18 Yale Law Journal.)

The fishermen declined to unload. They wished as pay at least the support wage based on the average 1942 price level. After the issuance of the preliminary injunction the dealers still further decreased the prices (R. 1651).

The Boston Fish Pier, upon which the New England Fish Exchange has its selling rooms, is located on submerged land in the coastal waters well beyond the mean low-water mark as it existed at the Formation of the United States. (R. 1786.) (See R. 1038.)

Up to both such occasions (the Gloucester and the Boston episodes), fish prices for 1946 and January 1947 had consistently been higher than former OPA maxima. (R. 1760-1.) The prices offered by the dealers from February 19 to February 24 were 60% below such maxima, and the prices thereafter were still lower. (R. 1651.) And all this in face of 68% cost of living increase. (R. 1452.)

These disputes essentially were labor disputes over wages. They were but more aggravated than those which normally took place daily in the effort of the dealer to maintain a low wage level. (R. 743-8, 754-5, 846-9, 1050-5, 1079-87, 1201.)[22]

Statement as to Jurisdiction

The jurisdiction of this Court is based on the Act of June 25, 1948, Chapter 646 (62 Stat. 869), New Title 28, United States Code, Judiciary and Judiciary Procedure, Section 1257 (3). The Statute of the Commonwealth of Massachusetts under which the proceedings were commenced against your Petitioners is drawn in question on the ground of its being repugnant to the Constitution of the United States, Treaties of the United States and certain laws of the United

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[22] For a situation parallel to the present proceedings and involving the British Fishing Industry wherein price controversies between vessel owners and "share" fishermen are deemed wage disputes, see Report of a Court of Inquiry into the Circumstances and Causes of the Stoppage of Work in the Trawler Fishing Industry, pursuant to the Industrial Court Act, 1919, July, 1946.

The Sherman Act. Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

States, and furthermore certain rights, privileges and immunities of your Petitioners under the said Constitution of the United States, Treaties thereof, and Statutes thereof were claimed but denied in the State proceedings.

Building Service Union v. *Gazzan*, 339 U. S. 532;
Teamsters Union v. *Hanke*, 339 U. S. 470;
Regents v. *Carroll*, 338 U. S. 586;
Hughes v. *Superior Court*, 338 U. S. 845.

Statutes Involved

1. Judiciary and Judiciary Procedure, Title 28, U. S. Code (1940) Ch. 2, Sec. 41 (3). (See New Title 28, ch. 85, sec. 1333, U. S. C. (1946 Sup. II.)

The District Court shall have jurisdiction of,

"Third, of all civil causes of Admiralty and Maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

2. Sherman Act, 26 Stat. 208, 15 U. S. C. A. Sec. 1, as amended.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

3. Clayton Act, Sec. 6; 38 Stat. 731, 15 U. S. C. A. Sec. 17.

The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations,

or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

4. National Labor Relations Act, Sec. 7, 29 U. S. C. A. Sec. 151 et seq. as amended by the Labor Management Relations Act of 1947.

Sect. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

5. Fishermen's Co-operative Marketing Act, 48 Stat. 1213, 15 U. S. C. A. Sects. 521, 522.

Sec. 521. Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

The term "aquatic products" includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several states, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, that such associations are operated for

the mutual benefit of the members thereof, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum. And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members."

Sec. 522. If the Secretary of Commerce shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced by reason thereof, he shall serve upon such association a complaint, stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Commerce may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Commerce shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request

of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Commerce shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceedings together with a petition asking that the order be enforced and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Commerce and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein, the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court shall, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer, or agent thereof, engaged in carrying on its business, or on any attorney authorized to appear in such proceedings for such association and such service shall be binding upon such association, the officers and members thereof.

6. Agricultural Marketing Act of 1946. Public Laws 733, 79th Cong., 2d ses., Aug. 14, 1946.

Title II, sec. 202 provides: "An integrated administration of all laws enacted by Congress to aid the distribution

of agricultural products through research, marketing aids and services, and regulatory activities." Section 207 defines "agricultural products" as including "fish and shellfish."

7. The Regulation of Fisheries Act. 46 U. S. C. 531.

The Masters of vessels engaged in cod or mackerel fisheries shall before commencement of voyage make a written agreement with every fisherman which provides that the fish or the proceeds of a fishing voyage or fishing voyages "shall be divided among the fishermen in proportion to the quantities or number of such fish which they may respectively have caught." [23]

8. The Enrollment of Fishing Craft Act. 46 U. S. C. 251, 263, 325.

46 U. S. C. 251—Only vessels of 20 or more tons that are both enrolled and licensed by the United States and lesser vessels that have a license in force, "and no others" are entitled to the privileges of vessels "employed in the coasting trade or fisheries."

46 U. S. C. 263—The form of a license for carrying on the coasting trade or fisheries shall be as follows: License for carrying on the (coasting trade, "whale fishery"), "mackerel fishing" as the case may be, etc.

46 U. S. C. 325—Whenever any licensed vessel—is employed in any other trade than that for which she is licensed—such vessel—shall be forfeited. But vessels which may be licensed for the mackerel fishing shall not incur such forfeiture by engaging in catching cod or fish of any other description whatsoever.

9. Regulation of Trade and Certain Enterprises Act. Mass. Gen. Laws (Ter. Ed.) Ch. 93.

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[23] Such agreements are now reduced to collective bargaining agreements between the vessel owner and the Atlantic Fishermen's Union, membership in which includes the captains. (Exh. 9, 27.)

Section 2. Every contract, agreement, arrangement, combination or practice in violation of the Common Law, whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.

Section 3. The Attorney General,—may bring an action in the name of the commonwealth—to restrain the doing in the commonwealth of any act forbidden or declared to be illegal by the preceding section, or any act in, toward or for the making or consummation of any contract, agreement, arrangement, combination or practice prohibited by said section, wherever the same may have been made. The Superior Court shall have jurisdiction to restrain and enjoin any act forbidden or declared to be illegal by said section.

10. Marine Boundaries of Massachusetts. (Mass. Gen. Laws, Ter. Ed., Ch. 1, Sec. 3.)

"The territorial limits of the commonwealth shall extend one marine league from its seashore at extreme low-water mark"—which "shall be prima facie the marine boundary of the commonwealth."

Presidential Proclamation

The Proclamation of the President of the United States setting forth "the policy with respect to coastal fisheries and certain areas of the high seas," dated September 28, 1945 (10 Federal Register 12303):

> "Now, Therefore, I Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to coastal fisheries in certain areas of the high seas:
>
> In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.

THE ACCOMPANYING EXECUTIVE ORDER

Ordered that the Secretary of State and the Secretary of the Interior shall from time to time jointly recommend the establishment by Executive Orders of fishery conservation zones in areas of the high seas contiguous to the coasts of the United States, pursuant to the proclamation . . . and said Secretaries shall in each case recommend provisions relating to the administration, regulation and control of the fishery resources of and fishing activities in such zones, pursuant to authority of law heretofore or hereafter provided."

INTERNATIONAL CONVENTION FOR NORTHWEST ATLANTIC FISHERIES AND NORTH ATLANTIC TREATY

1. International Convention for the Northwest Atlantic Fisheries (Congressional Record, 81st Congress, August 17, 1949, Pages 11860-11875):

Article IV, Sec. 2—provides that the fish species subject to such Convention are "fishes of the cod (cod, haddock, pollock) group," "flat (flounder) fishes," and "rose (red) fish."

Article VII, Sec. 1—The Commission set up under such Convention may undertake regulation "with respect to such species of fish" by causing the establishment of the following measures:

(a) Establishing open and closed seasons;

(b) Closing to fishing such portions of a sub-area as the Panel concerned finds to be a spawning area or to be populated by small or immature fish;

(c) Establishing size limits for any species;

(d) Prescribing the fishing gear and appliances the use of which is prohibited;

(e) Prescribing an over-all catch limit for any special fish.[24]

[24] The State Department states that such Convention is "in force", the requisite number of foreign nations having ratified same. For water "area" covered by convention, see Article 1 thereof.

2. North Atlantic Treaty, Art. 2, State Dept., Treaties and Other International Acts, Series 1964.

"The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being. They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them."

Questions Presented

Your petitioners say that the questions inherent in the proceedings and herein presented are federal questions of substance. They are as follows:

1. Whether a state court, sitting in equity, has jurisdiction under a state "anti-monopoly" statute to entertain an application for an injunction to restrain alleged "monopolistic" activities in foreign and interstate commerce and in the maritime jurisdiction where such activities involve and arise under maritime contracts of employment and sale of fish caught in international waters of the Atlantic Ocean and brought into the United States for national and international marketing thereof.

2. Whether a state court may apply its "anti-monopoly" statute in face and to the displacement of the Sherman Act, as modified by Section 6 of the Clayton Act, the National Labor Relations Act, Section 7 thereof, and the Fishermen's Co-operative Marketing Act, in their discrete or correlated application, where the circumstances involve employee "share" fishermen who come from 16 states and work on enrolled sea-going vessels of U. S. Registry, and which fishermen, through their Union, unilaterally undertake regulation of fish prices and production control in the course of such foreign and international fisheries.

3. Whether the Sherman Act as modified by Section 6 of the Clayton Act, the National Labor Relations Act, and the Fishermen's Co-operative Marketing Act, in their discrete or correlated application supersede, in the said circumstances, a state "anti-monopoly" act.

4. Whether Federal statutes regulating operations of enrolled U. S. fishing vessels (Enrollment of Fishing Craft Act) and employment contracts of "share" fishermen (Regulation of Fisheries Act) working on such vessels supersede the state "anti-monopoly" act where employee fishermen undertake production regulation in the course of fishing vessel operations and "price" bargaining for "share" wage determination.

5. Whether a state court may, by equity process, enjoin alleged "monopolistic" activities of such fishermen as they unilaterally undertake regulation of wages and other conditions of employment, where such activities take place either (a) in waters,[25] or (b) on structures running and located seaward of the mean low-water mark in the coastal waters off Massachusetts, such structures being the so-called Boston Fish Pier located and affixed in wholly submerged land in such maritime belt.

6. Whether a state court purporting to act under its "anti-monopoly" statute may, by equity process, regulate the conduct of fishing operations in waters beyond the state's own self-defined statutory marine jurisdiction (territorial waters) and in the waters of the Northwest Atlantic, inclusive of the waters off Canada and Colonial Possessions of France (the Islands of St. Pierre and Miquelon).

7. Whether, in view of the Presidential Proclamation of February 28, 1945, setting up conservation zones off the

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[25] See *E. B. Shipman* v. *Du Pre*, No. 689, October Term 1940.

Atlantic coast of the United States, and the International Convention for the Northwest Atlantic Fisheries, a state court, purporting to act under its "anti-monopoly" statute, may, by equity process, regulate the conduct of fishing operations in waters beyond the state's own self-defined statutory marine jurisdiction (territorial waters) and in the waters of the Northwest Atlantic, inclusive of the waters off Canada and said Colonial Possessions of France.

8. Whether the Final Decree is violative of the Federal Constitution in that it imposes involuntary servitude, violates liberty and due process, and denies the equal protection of the laws as well as the privileges and immunities of citizens of the United States, not only under such Constitution but under Section 6 of the Clayton Act, Section 7 of the National Labor Relations Act as amended, and the Fishermen's Co-operative Marketing Act, including, among other invalidity, (1) the prohibition of freedom of association to union fishermen for purposes of (a) selection of highest bidder for their catches and (b) minimum price and wage standardization through collective bargaining and other concerted activities, (2) the prohibition of all unilateral action—other than strikes—aiming at regulation of wages and work conditions, and (3) the requirement that wage-price bargaining be on an individual vessel basis.

9. Whether the Final Decree of the said State Court is violative of the 14th Amendment to the Federal Constitution in that it so lacks requisite precision of injunctive command as to operate *in terrorem.*

10. Whether it is a denial of due process for the said State Court to hold your petitioners in contempt of court for violation of a Decree which the Court itself declares erroneous for "indefiniteness."

11. Whether the U. S. District Court for the District of Massachusetts should have retained the several petitions

for removal filed by your petitioners in said District Court, and dismissed the proceedings in the State Court because of conflict between the aforesaid state "anti-monopoly" statute and the Commerce and Admiralty and Maritime Clauses of the Federal Constitution, and the Sherman Act as modified, and all the other aforementioned Federal Legislation.

Reasons For Granting the Writ

The issues involved are of national importance. Some are novel; others have not been specifically adjudicated by this Court. They not only affect the rights of fishing interests of Massachusetts, but of all the New England states and other states of the Atlantic Seaboard running down to Virginia whose vessels and citizens fish in the international fisheries of the Northwest Atlantic Ocean. This Northwest Atlantic fishing industry, especially the New England portion, but dominantly the Massachusetts segment thereof, historically, both prior to and since the formation of the United States, has ever been the subject of foreign relations as such affected the Colonies [26] and the United States. Up to the time of the proceedings in the State Court, no state had undertaken to regulate, beyond its statutory marine jurisdiction or the so-called three-mile maritime belt, as the case may be, production operations on the High Seas.

The State Court, by its decrees, seeks to regulate production activities of fishermen who came from sixteen states as they sail in and out of the ports of Massachusetts and other states on enrolled vessels of United States registry in various custom houses along the Atlantic Seaboard—and this as to activities in waters of the Northwest Atlantic even as far as 1200 miles, and more, from Massachusetts. Such claimed power looks to control of fishing

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[26] Judah, C. B.—The North American Fisheries and British Policy to 1713. Un. of Ill., 1935.

operations even off the coast of Canada and the Colonial Possessions of France (the Islands of St. Pierre and Miquelon). The federal authority should here be asserted to prevent state invasion of the foreign relations of this country.

The fish landed by the various fleets sailing out of ports of the states running from Virginia to Maine find their way into national and international markets. The great portion of the landings in Massachusetts by vessels sailing out of Massachusetts ports are the subject of this traffic. Can it be that because a minor portion of these landings in Massachusetts, as they come in through the stream of foreign commerce and pass on, in "continuous voyage," to and through the quasi-pipeline of interstate commerce, is tapped off for distribution in Massachusetts by wholesale dealers engaged in such national and international commerce, that thereby the entire fishing industry, inclusive of its Massachusetts segment, becomes subject to a state statute for the regulation of intrastate monopoly and restraint of trade, even to the displacement of the Sherman Act as modified by the Clayton Act? Can it be that the national need for centrality and uniformity in foreign relations and maritime affairs is thus to be made subject to fragmentation by the local outlook of a state court as to what is preferable national policy?

The State Court has declared, in its Opinion (R. 1803) as follows:

> "If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare." [27]

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[27] This "localism" is set aside where, as against employees, employers urge supersedure of State Legislation by some of the very Federal Legis-

This *ad hoc* return to Calhounism calls for correction by this Court and an assertion that the Federal Government is capable of taking care of the national welfare. The State Court, it is to be noted, indicated strong doubt of the above asserted policy as is manifest throughout the Opinion, and in substance calls for instruction and clarification by this Court. But, in so doing, it further states that it feels "the Federal and State Laws may operate together" (R. 1805) in the field of interstate commerce. This determination to supplement the Sherman Act and other Federal Law and even displace the Clayton Act, collides with many decisions of this Court in analagous fields of the law.

The warring doubts of the State Court as to the correctness of its judgment and its recognition that its "views are not final in any event" (R. 1805) points up the novelty of some of the Federal questions. The lack of a decision by this Court in a case involving head-on conflict between state and federal policy and legislative plans for the regulation of monopoly and restraint of trade in the field of foreign and interstate commerce is noted by the State Court, but, with candor in its expressions of doubt, it refers, as reliance for its position, to decisions of this Court upholding the Constitutionality of said State Statutes relating to intrastate commerce in situations absent such specific conflict. These proceedings therefore present to this Court a situation of sharp conflict between State and Federal Law where a State Court, adversely to the Federal Supremacy, has decided a Federal question of substance not theretofore specifically determined by this Court.

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lation upon which petitioners here rely (*Hamer* v. *Nashawena Mills*, 315 Mass. 160; *Hathaway Bakeries* v. *Comm.*, 316 Mass. 138; *D. P. U.* v. *N. E. Tel. & Tel. Co.*, 262 Mass. 137.) The national welfare is then "clearly manifested" (R. 1804). Note contrivance with Taft-Hartley Law (Sec. 8(b)(3)) as Final Decree (R. 1817) imposes "good faith" bargaining on the Union. This is conflict between State and Federal Plans, as the Decrees makes available State contempt proceedings in place of the "exclusive" administrative remedy of such Act (Sec. 10).

This case presents a further substantial Federal question in that the State Court has decided such question in a way not in accord with applicable decisions of this Court as they deal with Federally created rights of labor in the course of foreign and interstate commerce. This case involves non-boat owning employees, whose wages come from their vessel-owning employers to whom they "sell" fish. These fishermen are not "businessmen" engaged in price controversies solely with non-employing dealers (*U. S.* v. *Local 36,* 177 F. (2) 320, Cert. Den. 339 U. S. 947), but rather are crewmen in an employee-employer relationship whose "spur to action is related to wages and working conditions." (*Allen Bradley* v. *Local 3,* 325 U. S. 797, at 807, Footnote 11.) Such a case concerning fishermen *qua* employees has not been before this Court heretofore.

The State Court refuses to recognize the controlling application of the Clayton Act, Sec. 6 thereof, to Massachusetts and other state labor engaged in foreign and interstate commerce by High Seas fishing; and thus again engages in fragmentation of the national policy as it has been applied to the unilateral activities of labor seeking advance in economic status (*U. S.* v. *Hutcheson,* 312 U. S. 219). The State Court declares that because the Federal Government has affirmatively declared that labor shall be immunized from the application of the Sherman Act by the Clayton Act that therefore the state may undertake a contrary policy and plan to the outlawry of Massachusetts and other state fishermen from the protection of federal law.

The State Supreme Court asserts that a labor organization that has achieved virtual control of manpower in a particular industry per se is a monopoly when it undertakes unilateral action,—short of strikes,—for wage-determination and work-stint control. This conflicts with the Sherman Act and Clayton Act. Thorough unification of manpower employed in a national and international in-

dustry and unilateral action by such organized labor for regulation of work conditions have not hitherto been deemed a violation of federal law.

The State Court has undertaken in violation of applicable provisions of the Federal Constitution, compulsory arbitration, by judicial fiat, of wages and working conditions in private industry. Such action collides with prior decisions of this Court in related situations.

Such State Court by its Final Decree forbids the fishermen from acting in free association in their wage dealings with their employers and seeks to confine "price" bargaining in employee-employer relations to individual unorganized action. This conflicts with the Constitution (14th Amendment) and the Clayton and National Labor Relations Acts.

This Court has never construed the Federal Fisheries Co-operative Marketing Act. The State Supreme Court so construes it as to forbid its benefits to employee fishermen engaged in the national fisheries. Its Opinion (R. 1807-08) declares that its provisions are intended only for the propertied classes, the boat-owners—not for the propertyless in employee status even though, by reason of the share wage system, the fishermen have a wage property interest in their catches. This calls for the aid of this Court so that the Atlantic Fishermen may know their economic destiny as co-operators, believing as they do they may so act for "mutual aid" (Sec. 7 of the National Labor Relations Act) and "mutual help" (Sec. 6 of the Clayton Act).

Interlaced in such declination to abide by Federal policy is another substantial Federal question. Has a State Court of Equity jurisdiction to entertain application for an injunction aimed at regulation of interstate and foreign commerce in maritime affairs? The fishermen work under maritime contracts of employment, calling for fishing on the

High Seas under a wage system prescribed by Federal Statute (the Regulation of Fisheries Act, 46 U. S. C. 531-532; the Enrollment of Fishing Craft and Licensing of Masters Acts, 46 U. S. C. 251-263).

Contemporary organization and behavior of the Fishing Industry embraces newer practices in industrial relations, —that is to say, collective bargaining agreements between vessel owners and the Atlantic Fishermen's Union, whose membership includes the captains or masters of the fishing craft. The trinity of agreements called for by the Regulation of Fisheries Act are incorporated in annual labor contracts (Exh. 9, 28). Such Federal Law has never been, in such modern scene, the subject of this Court's decision-making. Moreover, the fishermen work under maritime contracts as they discharge or stevedore catches at ports of landing, and they engage in the administration of a maritime contract as they make "sale" in the stream of foreign and interstate commerce. Ever since the Judiciary Act of 1789, State Courts have not exercised jurisdiction in maritime affairs, "saving" the power to accord a common law remedy where the common law is competent to give it (*C. J. Hendry Co.* v. *Moore,* 318 U. S. 133). The State Court requires correction when it extends its equity process to the Federal maritime domain. The authority of this Court should here be asserted against State invasion of the foreign policy and maritime jurisdiction of the Federal Government. "States-Rights" on the High Seas is out of order.

Such State usurpation collides with the Presidential Proclamation of September 28, 1945, asserting national jurisdiction over the Continental Shelf adjacent to the United States, and also the International Convention for the Conservation of the Marine Resources in the Northwest Atlantic, the waters where these fishermen fish. The potential of this asserted State power bears even on the North

Atlantic Treaty (Art. 2 thereof); (compare Charter of the United Nations Ch. IX, Art. 55). Such foreign policy should not be the subject of State interference. The State also claims jurisdiction over fishermen activities as they occur in the ocean waters of and upon structures located in wholly submerged lands within the maritime belt seaward of the mean low-water mark off the coast of Massachusetts,—a conflict with the clear implications of the decisions of this Court involving the Tide-Lands of California, Louisiana and Texas. A State, also, cannot annex territorial jurisdiction or extend marine boundaries by legislation or court edcree. (Ireland, Marginal Seas around the States, 2 Louisiana Law Rev.)

Burdick, Law of the American Constitution, p. 279;
1 Cooley, Constitutional Limitations (8th ed.), p. 249;
1 Willoughby, The Constitution of the United States (2d ed.), p. 407-425).

The State Supreme Court also has declared the petitioners in contempt of court for violation of an injunction which it finds is erroneous for "indefiniteness" (R. 1811). Can persons be held in contempt of a decree so ambiguous in its command that no one, even the Court itself, knows its meaning?

The Final Decree now operative likewise lacks requisite precision of injunctive command, and your petitioners are thus subect to its *in terrorem* potential and possible contempt proceedings. This is a denial of essential fair play and due process of law.

The State Court affirmed the denial of the Petitions to Remove. The only procedure for review of its action and the action of the U. S. District Court for the District of Massachusetts after remand to the State Court is by resort to this Court,—as provided by the Removal Statute prevailing at the time of the filing of the Petitions to Remove.

Your petitioners say that the United States Court should have dismissed the State proceedings because of their conflict with controlling Federal Law.

There Are No "States' Rights" on the High Seas

A. The State Has No Equity Jurisdiction in These Maritime Affairs: Especially in the International Fisheries

High Seas fishing is foreign commerce. Fishing is carried on under contracts of employment which are maritime contracts. (*Union Fish Co.* v. *Erickson,* 248 U. S. 308.)

This foreign sea-borne commerce does not lose its character until the "end of the voyage." (*Abby Dodge* v. *U. S.,* 223 U. S. 166; *Bradford* v. *Drew,* 46 Mass. 188 at 190.)

The fishing voyage ends, not on arrival at the dock but by delivery of the catch after sale, "itself a maritime contract." *Union Fish Co.* v. *Erickson, supra.* The discharge of fish by fishermen, the stevedoring of the catch in the course of vessel operation, itself is a maritime transaction in foreign commerce. Up to discharge, the fishing trip is and remains in foreign commerce.[28] (*Amer. Stevedores* v. *Porello,* 330 U. S. 446; *Carter* v. *Weeks Stevedoring Co.* v. *Lazarus,* 330 U. S. 422.)

As the catch, processed or otherwise, moves on, it clearly is in the stream of interstate commerce. (*Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148.) When a cargo of fish from the Atlantic passes from the boat into the great stream of interstate commerce it is in such commerce even before it leaves the boat.

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[28] The Court below states that "no maritime contracts are in issue." (R. 1808.) This is inconsistent not only with the law but with other findings of the Court that the fishermen were guilty of a "monopoly in the sale" of a commodity "in the stream of interstate or foreign commerce" "because the product comes from the High Seas." (R. 1797-1803.) (See also Robinson, "On Admiralty", p. 172-96, 344, 356.) Compare findings that the "controversies arose" . . . "over sales of fish" (R. 1807) to "buyers".

Pahuke-Walker Marketing Co. v. *Bondurant,* 257 U. S. 282;
Lemke v. *Farmers Grain Co.,* 258 U. S. 5;
Curran v. *Wallace,* 306 U. S. 1.

There is accordingly no hiatus between the federal jurisdiction which is exclusive over admiralty and the federal jurisdiction which is actually being exercised over the interstate commerce of the fishing industry. (*U. S.* v. *New England Fish Exchange,* 258 F. 752 and 292 F. 511.) (See Exh. 6.)

Chicago Bd. of Trade v. *Olsen,* 262 U. S. 1;
Stafford v. *Wallace,* 258 U. S. 495;
U. S. v. *Amer. Fed. of Musicians,* 47 F. S. 304; 318 U. S. 741.

The fishing fleets operate under the maritime jurisdiction of the United States which is exclusive, although a state may exercise police power within, but only within, its own territorial waters in the absence of conflicting federal legislation.

U. S. v. *California,* 332 U. S. 19;
C. J. Hendry Co. v. *Moore,* 318 U. S. 133, 135;
Skiorates v. *Florida,* 313 U. S. 69, 75;
Manchester v. *Massachusetts,* 139 U. S. 241.

The sea fisheries of the United States are entirely within the regulatory power of Congress. The statutes and decisions all point that way. To illustrate:

46 U. S. C. 251—Only vessels of 20 or more tons that are both enrolled and licensed by the United States, and lesser vessels that have a license in force, "and no others" are entitled to the privileges of vessels "employed in the coasting trade or fisheries."

46 U. S. C. 263—The form of a license for carrying on the coasting trade or fisheries shall be as follows: License

for carrying on the (coasting trade, "whale fishery," "mackerel fishing", as the case may be), etc.

46 U. S. C. 325—Whenever any licensed vessel * * * is employed in any other trade than that for which she is licensed * * * such vessel * * * shall be forfeited. But vessels which may be licensed for the mackerel fishing shall not incur such forfeiture by engaging in catching cod or fish of any other description whatsoever. (See also 46 U. S. C. 531.)

Fratas v. *Howland,* Fed. Cases No. 5066;
Somerville v. *The Francisco,* Fed. Cases No. 13170.

The subject matter of the present litigation is outside the jurisdiction of the state courts for the reason that it belongs to the exclusive jurisdiction of the federal courts. Commerce by water is in an entirely different class from commerce carried on by land, with respect to the power of the Federal Government and its courts. Insofar as interstate commerce on land is concerned, there is only one source of federal power—namely, the so-called Commerce Clause of the Federal Constitution (U. S. Constitution, Art. I, Sec. 8). On the other hand, the power of the Federal Government to regulate commerce by water and the jurisdiction of the federal courts over that commerce is derived from two distinct sources—one being the Commerce Clause, and the other the Admiralty Jurisdiction Clause. Article III, Section 2 of the U. S. Constitution provides that:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

In a general way it may be said that in all questions of interstate commerce by land, in which jurisdiction is derived from the Commerce Clause, the state courts have jurisdiction unless Congress has acted in the matter, in which case jurisdiction belongs to the federal courts unless Congress in so acting has preserved the jurisdiction of the state

courts; while in commerce by water, where the jurisdiction is derived from the Admiralty Clause, jurisdiction belongs primarily and exclusively to the Federal courts, unless Congress has acted in a manner to give the state courts jurisdiction, and then only in cases where the Constitution permits Congress to give the state courts jurisdiction. The U. S. Supreme Court has narrowed down the power of Congress to confer jurisdiction upon the state courts in an effectuation of this provision in maritime matters.

Seas Shipping Co. v. *Sieracke*, 328 U. S. 85;
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149;
Southern Pacific Co. v. *Jensen*, 254 U. S. 205;
Washington v. *Dawson & Co.*, 264 U. S. 219.

The Knickerbocker Ice Co. case is most decisive of the question here under consideration. It holds that where state action is not permissible, judicial action is included in the prohibition. The decision declares:

> "* * * it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations."
>
> "Here, we are concerned with a wholly different constitutional provision,—one which, for the purpose of securing harmony and uniformity, prescribed a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the states. Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

Consideration of the reservations to suitors of "common law remedies" made by the original Judiciary Act of 1789 and embodied in the Judicial Code (28 U. S. C. (1940) ch. 2,

sec. 41 (3)) [29] indicates, in the first place, that the reservation does not make the common law applicable to maritime cases, and that the reservation does not cover "*common law rights*", but, "common law remedies",—those remedies which were anciently enforced in the common law courts of England and this country, as distinguished from Equity Courts on the one hand and Admiralty Courts on the other. And these only as known in 1789 (*Taylor* v. *Carroll*, 20 How. 583; *The Moses Taylor* v. *Hammons*, 4 Wall. 411; *The Ad Hine* v. *Trevor*, 4 Wall. 1).

On the *Ad Hine* case the Court quotes Mr. Justice Story's Commentaries On the Constitution, as follows:

> "The admiralty jurisdiction naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects, and on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the National Government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad and gives to commerce and navigation the most encouraging support at home."

The whole history of the North Atlantic Fisheries is one of diplomatic relations (Treaties Affecting Fisheries Report No. 152, 2d ser., U. S. Tariff Commission; Proceedings in North Atlantic Coast Fisheries, Arbitration before Permanent Court of The Hague, 12 vol. Senate Doc. 870, 61st Cong., 3d ses.).

That an injunction is not a "common law remedy" goes without saying. It was unknown to admiralty jurisdiction, which was a stranger to both equity and the common law of England, being based on the civil law and the customs of the sea. (Benedict, Admiralty Jurisdiction, Sec. 1.)

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[29] New Title 28, Ch. 85, Sect. 1333. U.S.C. (1946 Sup. II), originally 1 Stat. 76, 77 Ch. 20, Sec. 9 of Judiciary Act of Sept. 24, 1789.

Moreover, irrespective of statute, the state courts are not competent to issue injunction orders or decrees affecting the operation of interstate or foreign commerce (*Gt. North. Ry. Co.* v. *Merch. Elec. Co.*, 259 U. S. 291; *Prentis* v. *Atl. Coast Line*, 211 U. S. 210, 226-7).

The final decrees show that they in effect provide a rule for the regulation of fishing operations on the High Seas and sale of fish in interstate commerce in the future. What the state cannot do, constitutionally, through its Legislature, it cannot do through any of its other official organs.

Virginia v. *Rives*, 100 U. S. 313;
Civil Rights Cases, 109 U. S. 2;
Home Tel. Co. v. *Los Angeles*, 227 U. S. 278;
Saunders v. *Shaw*, 244 U. S. 317;
Iowa-Des Moines Natl. Bank v. *Bennett*, 284 U. S. 239;
Hughes v. *Superior Court*, 339 U. S. 460.

The jurisdiction of a state court substantially is limited, under the Judiciary Act, to judgment for money damages. The proper forum of the injunctive relief sought is exclusively in the federal courts—under the Sherman Act. (*Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261.)

The expression of public policy, as enunciated in the so-called "Norris-LaGuardia Act" (c. 90, 47 Stat. 70, 73, Title 29, Secs. 101-115), precludes the issuance of an injunction contrary thereto as against labor unions. (*U. S.* v. *Hutcheson*, 312 U. S. 219). If this action had been commenced in a federal district court no injunction could have been granted as against the defendant union. The transcendent public policy of the Federal Government forbids.

To hold otherwise would create an anomalous situation, wherein state courts of subordinate jurisdiction would be endowed with greater powers to afford relief for violation of rights growing out of federal jurisdiction than the fed-

eral courts themselves. (*So. Pac. Rd. Co.* v. *Arizona,* 325 U. S. 761; *DeSanto* v. *Penn.,* 273 U. S. 34.)

This anomaly may well be given sanction if the decrees here in question are in any way affirmed. The Federal Congress has not endowed the states with power to act in situations involving monopoly and restraint of trade in the field of admiralty and maritime jurisdiction and foreign and intertate commerce. (Adm. v. Chook, 320 Mass. 187.) The equity process of the Commonwealth as set forth in General Laws, Ch. 93, sec. 2, is confined to substantive law solely of state origin. By its very terms this state law operates only "within the Commonwealth", its "territorial jurisdiction" (*Foley Bros.* v. *Filardo,* 336 U. S. 281, 285). The statute itself marks off its own boundaries. (*U. S.* v. *Spelar,* 94 S. Ct. 15; *Foley Bros.* v. *Filardo,* 336 U. S. 281, 285.) This Commonwealth, for matters occurring in the admiralty and maritime jurisdiction, can only provide a forum wherein actions in personam may be adjudicated as they derive from a substantive law federal in nature. (*Thorneal* v. *Cape Pond Ice Co.,* 321 Mass. 528.) Congress alone under its power over commerce and maritime affairs can enlarge the remedy in maritime affairs.

Spencer v. *Kelley & Sons,* 285 U. S. 502, 513;
Gahagan Construction Co. v. *Amere,* 165 F. (2) 301;
Swanson v. *Marra Bros.,* 328 U. S. 1.

Congress has done so by the Sherman Act, as modified by the Clayton Act. Under the Sherman Act, the Federal Courts alone can act.

Columbia River Packers Assoc. v. *Hinton,* 315 U. S. 143;
U. S. v. *Local 36,* 117 F. (2) 320; Cert. Den., 339 U. S. 947;
U. S. v. *New England Fish Exchange,* 258 Fed. 732, 292 F. 511;
U. S. v. *Hamburg-American Co.,* 239 U. S. 466.

In the present proceedings, the right and the remedy are not in accord with the requirements of the Judiciary Act. The State Court is without jurisdiction.

N. Y. Lumber Trades Assoc. v. *Lacey,* 281 N. Y. S. 647, 369 N. Y. 595; Cert. Decn., 298 U. S. 684;
C. J. Hendry Co. v. *Moore,* 318 U. S. 133.[30]

B. The State Has No Jurisdiction Over Federal Territory: International Conservation

In *United States* v. *California,* 332 U. S. 19, the Court stated "that the original colonies separately did not acquire ownership to the three-mile belt of the soil under it."

Massachusetts as an Intervenor, and in its contention before the United States Supreme Court, had urged that as one of the thirteen original states it acquired ownership to the aforesaid three-mile belt off its coast and to the soil thereunder. (See its Motion for Leave to Intervene "to protect its rights.") This Court by its decision, therefore, has bound Massachusetts.

Not until 1859 did Massachusetts enact a concept of its own marine jurisdiction. By General Laws, chap. 1, sec. 3, "The territorial limits of the Commonwealth shall extend one marine league from its seashore at extreme low-water mark, and the coastal line," as defined, "shall be prima facie the marine boundary of the Commonwealth." This prima facie jurisdiction is subject to curative delineation (*Dunbar* v. *Lamphere,* 69 Mass. 268, as is here made manifest by the Record (1786-87) and *U. S.* v. *Calif., supra.*[31]

The Record shows that the Boston Fish Pier is located on submerged land in the marginal seas (coastal waters)

[30] The warnings of Justice Black in the Hendry Case now call for enforcement in affirmation of the exclusive jurisdiction of the District Courts in admiralty and maritime affairs.

[31] The power and dominion of the United States, its full political sovereignty, certainly is equal to and doubtless is greater than the Federal jurisdiction arising out of cession of land free of reservation in favor

beyond the mean low-water mark as it existed prior to and at the Formation of the Union of the United States. It is situate in the open sea facing the Atlantic Ocean. (R. 1786.)

The labor union activities of the fishermen, therefore, as they may occur on the Boston Fish Pier, take place on what in effect is an island of territory over which the Federal Government has full dominion, and one exclusively and completely insulated from State jurisdiction and process. The power of the Commonwealth, at most, is confined to fishing per se within the statutory territorial waters. (*The Abby Dodge* v. *U. S.*, 223 U. S. 166; *Skiorates* v. *Florida*, 313 U. S. 369.) Submerged lands, and structures affixed therein (such as the Boston Fish Pier), therefore, are not a subject for its control even in the absence of conflicting Federal law. It is a field in which the State cannot act under any circumstances.

Complete Federal supremacy has already been asserted even over the territorial waters of Massachusetts, let alone the High Seas beyond—jurisdiction over the latter being foreclosed to the Commonwealth, as activities thereon by persons or vessels, "sea-going" in character, cannot be controlled by the Commonwealth. (*Commonwealth* v. *Breakwater Co.*, 214 Mass. 10, 15-6.)

The Federal Government by a Presidential Proclamation of Sept. 28, 1945, established fishing conservation zones "in areas of the High Seas contiguous to the coasts of the United States" (Executive Proclamation 2667, Sept. 28, 1945, 10 Federal Reg. 12303). On Aug. 17, 1949, by the Northwest Atlantic Fisheries Convention entered into between the United States and ten other nations, the United States delineated such conservation zones and the species

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of a ceding state. (*Newcome* v. *Rockport*, 183 Mass. 77; *Opinion of the Justices*, 1 Met. 580; *Fay* v. *Locke*, 201 Mass. 387.) The laws of Massachusetts and its court processes, hence, do not extend to the submerged lands below the mean low-water mark as it existed at the formation of the Union.

to be regulated.[32] (Cong. Record, 81st Cong., Aug. 17, 1949, pp. 11860-11875, 1st ses.; Hearings on the Fisheries Convention before the Sub-Committee of the Committee on Foreign Relations, U. S. Senate, 81st Cong., 1st ses., July 14, 1949, pp. 5-70.) These zones embrace the areas to which these fishermen resort (R. 1749), and the fish species covered are those which the petitioners fish for (Conv. Art. IV, Sec. 2). Both the Proclamation and the Convention are law in Massachusetts, over-riding State legislation and court decrees. Such Federal actions are judicially noticeable. (*Stankus* v. *N. Y. Life Ins. Co.*, 312 Mass. 366; *Sears* v. *The Scotia*, 14 Wallace, 170.)

The Convention in Article VIII, sec. 1, calls for regulations as follows:

a. Establishing open and closed seasons;

b. Closing to fishing such portions of a sub-area as the Panel concerned finds to be a spawning area or to be populated by small or immature fish;

c. Establishing size limits for any species;

d. Prescribing the fishing gear and appliances the use of which is prohibited;

e. Prescribing an over-all catch limit for any special fish.

This Convention fits in with the history of British-American diplomatic relations concerning the North Atlantic Fisheries. (See Treaties affecting Northeastern Fisheries, R. 152, 2d series, U. S. Tariff Commission; Proceedings in the North Atlantic Coast Fisheries Arbitration before the Permanent Court of Arbitration at The Hague, (12 vol.) Sen. Doc. 870, 61st Cong., 3d ses., 1910.)

In *U. S.* v. *Calif., supra,* this Court said: "but whatever any nation does in the open sea which detracts from its common usefulness to nations, or which another nation

[32] This Court takes judicial notice of international situations. (*Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288.)

may charge detracts from it is a question for consideration among nations as such, and not from separate governmental units."

Massachusetts cannot legislate law directly seeking to control foreign commerce or relations. (*Hines* v. *Davidowitz,* 312 U. S. 62; *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410.) Obviously, it cannot legislate by injunction decree, especially since what the State Legislature cannot do, its courts cannot do. (*Virginia* v. *Rives,* 100 U. S. 313; *Civil Rights Cases,* 109 U. S. 3; *Home Tel. Co.* v. *Los Angeles,* 227 U. S. 278; *Saunders* v. *Shaw,* 244 U. S. 317; *Iowa-Des Moines Natl. Bank* v. *Bennett,* 284 U. S. 239.) A fortiori, such cannot be done in face of the International Conservation Convention. Such intervening circumstance precludes state action now in any event. (*Duplex Printing Co.* v. *Deery,* 254 U. S. 443, 464; *American Steel Foundaries Co.* v. *Tri-City Council,* 257 U. S. 184, 201.) That is to say, the proceeding as now before the Court is governed by the law as it has since developed.

Both this Presidential assertion of national policy and the Convention under the treaty power of the Constitution (U. S. Constitution, Art. II, sec. 2, par. 2) over-ride the Final Decrees (*Patsone* v. *Penn.* 232 U. S. 138; *Mo.* v. *Holland,* 252 U. S. 416). Since the situation involves foreign relations, the State is displaced even as to internal affairs ordinarily reserved to the Commonwealth (*Fairfax* v. *Hunter,* 7 Cranch, 603; Crandall, Treaties, Their Making and Enforcement, 2d ed. pp. 246-50). The Presidential Proclamation supplements the Conservation Convention in order to protect free-swimming ocean fish which respect no imaginary water boundaries and cross into the three-mile marginal belt right up to the Boston Fish Pier and the docks of Gloucester and New Bedford (*Toomer* v. *Witzell,* 334 U. S. 385).

The Final Decree seeks to avoid the impact of the Con-

vention by not forbidding the fishermen from complying with the Convention. This decree is a regulation of conduct on U. S. vessels on the High Seas beyond the territorial and marine jurisdiction of the State, even purporting to run in waters off Foreign Nations. Also it is an attempt, by verbal design, to avoid conflict between a foreign policy of the U. S. and a State Court decree. It runs up against the disabilities incident to conflict between State and Federal law where such latter has "occupied the field." If approved, all a State need do in situations of conflict between state and national policies and plans is to be so verbally adroit.

The fishermen do not know what the Final Decrees purport to mean or may mean in relation to the Conservation Convention or the Fisheries Co-operative Marketing Act, and other Federal Legislation referred to in their pleadings or otherwise. The fishermen should not be exposed to a design of troublous ambiguity. Contempt proceedings lurk therein; so equivocal are they with "overhanging threats of future punishment." (*Thornhill* v. *Ala.*, 310 U. S. at 10) as to operate *in terrorem* (*ex parte Young*, 209 U. S. 123).

The Federal Anti-Trust Act Displaces the State "Anti-Monopoly" Act

The power to regulate interstate and foreign commerce is vested absolutely and without limit in the national government, together with express power to exclude the states from interfering therein. (U. S. Constitution, Art I, Sec. 8; Art VI, Clause 2.)

In *Schwabacher* v. *U. S.*, 334 U. S. 182, the law on this point is drawn down to a very sharp focus in the following language:

> "But the effect of the state law in relation to a constitutional act of Congress, in view of the constitutional

provision, Art. VI, Clause 2, that the latter shall be 'The supreme law of the land'—'laws of any state to the contrary notwithstanding' is for us to determine. Our first inquiry here, therefore, is whether the Interstate Commerce Act accords recognition to those state law rights, if any exist."

Prudential Ins. Co. v. *Benjamin,* 328 U. S. 408
H. P. Hood & Sons v. *Dumond,* 336 U. S. 525
Rice v. *Santa Fe Elevator Corp.,* 331 U. S. 218

Ascertainment of the will of Congress will be somewhat helped by a comparison of the Sherman Act with the State Anti-Monopoly Law. In *Northern Securities Co.* v. *U. S.,* 193 U. S. 197, 331, the Court said:

> "It is sufficient to say . . . That the act is not limited to restraints of interstate and international commerce that are unreasonable in their nature, but embrace all direct restraints imposed."

The Sherman Act and the Anti-Monopoly Statutes of Massachusetts are alike in being statutory enactments of the common law in respect to monopolies.

As the State Supreme Court stated:

> "In general, the purposes of the State and Federal Laws are the same. Certainly that is true of our Statute and the Sherman Act" (R. 1804).[33]

The Clayton Act and the Norris-LaGuardia Act did not repeal any of the provisions of the Sherman Act, thereby creating a vacuum into which the common law of monopoly or any like statutory law can re-enter.

Since both Acts cover precisely the same field, the State Act should be held superseded when sought to be applied to interstate monopoly in the national and international

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[33] Here it must be said that since the State Statute re-enacts substantive common law, its Courts are up against the admiralty and maritime clause of the Constitution and the provisions of the Judiciary Act granting federal courts exclusive jurisdiction in maritime affairs, as aforementioned.

fisheries. The fact that there are differing and conflicting provisions in the two Acts reinforces the conclusion of supersedeas. For instance, the Federal legislation forbids combinations to reduce as well as to maintain or to increase prices. (*U. S.* v. *Socony Vacuum Oil,* 310 U. S. 50). Whereas the State legislation forbids only undue enhancement of prices. The Federal legislation also prohibits prosecution of agricultural co-operatives and labor organizations (Clayton Act, Sec. 6) acting unilaterally in their own interest.

U. S. v. *Borden,* 308 U. S. 188;
U. S. v. *King,* 250 F. 908;
U. S. v. *Dairy Co-op. Assoc.,* 44 F. S. 475;
U. S. v. *Hutcheson,* 312 U. S. 219;
Allen Bradley Co. v. *Local 3,* 325 U. S. 797;
U. S. v. *Carpenters Union,* 330 U. S. 395;
U. S. v. *Amer. Fed. of Musicians,* 318 U. S. 741.

In considering the validity of a state statute which affects interstate commerce, two distinct questions are presented and must be carefully distinguished.

In the first place, the Commerce Clause of the Federal Constitution delegates to the Congress the power to regulate interstate commerce. In conferring that power upon the Congress the framers of the Federal Constitution intended that interstate commerce should be protected against state legislation which might obstruct the free flow of such commerce. They intended that such commerce should be subject to uniform regulations of the Federal Government in the interest of the nation as a whole. Only when national uniformity is not essential may the State or Federal Government act severally. (*Wilson* v. *Black-bird Creek Marsh Co.,* 2 Peters 245; *California* v. *Thompson,* 313 U. S. 109.)

Brown et al v. *Houston et al,* 114 U. S. 622;

Johnson v. *Haydel,* 278 U. S. 16;
Foster Packing Co. v. *Haydel,* 278 U. S. 1;
Morgan v. *Va.,* 328 U. S. 373;
Cleveland v. *U. S.,* 329 U. S. 14;
Hines v. *Davidowitz,* 312 U. S. 538;
Smith v. *Alabama,* 124 U. S. 465, 473.

Thus, in the *Passenger Cases,* 7 How. 282 (1849), the United States Supreme Court held invalid a statute of the State of New York which imposed a tax upon vessels entering the Port of New York. The Court in those cases rejected the proposition that the states have a general concurrent power to regulate commerce in the absence of Congressional legislation relating to the same subject as that covered by the state regulation.[34]

On the other hand, if the Congress has not acted with regard to a proper subject of state regulation and the state regulation, although incidentally affecting interstate commerce, does not obstruct the free flow of that commerce and does not impose an undue burden upon it, the state statute will be held valid. (*Minnesota Rate Cases,* 230 U. S. 352.)

When, however, a state statute purports to regulate a subject in the field of interstate commerce which is already regulated in the same manner by an Act of Congress, the state statute must give way, and the Act of Congress must prevail. (*Gibbons* v. *Ogden,* 9 Wheat. 1; *Erie R. R. Co.* v. *N. Y.,* 233 U. S. 567.)

Any possible doubt as to the all-inclusiveness of the federal anti-monopoly regulative scheme is clearly settled in *Apex Hosiery Co.* v. *Leader,* quoted and cited in

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[34] Nor do the "apologetics of the police power" (*So. Pac. Ry. Co.* v. *Arizona,* 325 U. S. 761) justify extension of State power over interstate commerce beyond those "traditionally local matters as public safety and order and use of streets and highways." (Allen Bradley v. Board, 315 U. S. 740.)

U. S. v. *Frankfort Distilleries,* 324 U. S. 293 at 297-8, as follows:

> "On the other hand, the sole ultimate object of respondents' combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress in passing the Sherman Act left no area of its constitutional power unoccupied; it exercised all the power it possessed." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 495.

In *Local 167, International Brotherhood* v. *U. S.* 291 U. S. 293 at 297, it is said:

> "The Sherman Act denounces *every* conspiracy that is in restraint of trade, including those that are to be carried on by acts constituting intrastate transactions."

Hence, the Sherman Act is all-inclusive. When interstate commerce is involved, the state law cannot be supplemental.

Columbia River Packers Assoc. v. *Hinton,* 315 U. S. 143;
Allen Bradley v. *Local 3,* 325 U. S. 686;
U. S. v. *Hutcheson,* 321 U. S. 319;
Apex Hosiery Co. v. *Leader,* 310 U. S. 469, 495.
The Commerce Clause and the National Economy, 1933-1946, Robert L. Stern, 59 Harvard L. R., 647, 692, and 883-947.

That is to say, where a state statute conflicts with federally protected labor rights, the state law cannot survive. State regulation cannot be concurrent. (*Auto Workers Union* v. *O'Brien,* 339 U. S. 254; *Plankington Packing Co.* v. *Wisconsin,* 338 U. S. 953.)

> ". . . for Congress has protected union conduct which", as Massachusetts here is attempting, "the State has forbidden". See also *Slocum* v. *Del. Lack. & Western Rd.,* 339 U. S. 239; *Order of Rw. Conductors* v. *Southern Ry. Co.,* 339 U. S. 255.

Now, the movement of fish on U. S. vessels (1 U. S. C., sec. 3) and from the great fishing ports into the interior is clearly interstate. Fish from the Atlantic flow into the coastal cities of Massachusetts and a considerable, but minor part of the stream, is withdrawn for Massachusetts' use; but the condition is essentially the same as in the *Chicago Board of Trade* case. (*Chicago* v. *Olsen,* 262 U. S. 1, at 33; *Stafford* v. *Wallace,* 258 U. S. 495.)

In the great quasi pipe-line cases involving commerce in meat and in grain, this Court held existing federal statutes not only to be dominant but to exclude assertion by the states of their own regulating powers over commerce. This principle having been applied to meat and grain, can it be true that no federal question under the Commerce Clause arises out of a complaint which shows that a state asserts in very large measure its own regulating power over the quasi stream of fish which flows from the Atlantic into the United States?

There can be no doubt that the national act and the state act, as the state court seeks to apply it, cannot "move freely within the orbits of their respective purposes without impinging upon one another." (*Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 207 (1944); *National Labor Relations Bd.* v. *Hearst Publications, Inc.,* 322 U. S. 111, 123 (1944).) This even where the "policy of a state is expressed by its judicial organ rather than by the Legislature." (*Hughes* v. *Superior Court,* 339 U. S. 460.)

Since the national act is "intended to solve a national problem on a national scale," there would not seem to be any excuse whatever for permitting the state to attempt to assume the functions of the national government, and thereby to interfere with the orderly administration of the national act. (*So. Pacific Co.* v. *State of Arizona,* 325 U. S. 761.) In order to preserve the power of the states, a federal act must contain an express saving clause in a

case such as the one at bar, "if the usual rules of supersedure are to be overcome." (*First Iowa Co-operative* v. *F. P. C.*, 326 U. S. 715.)

It follows, therefore, that in the absence of affirmative consent, a congressional negative should be presumed in the courts against state action when the Congress has previously acted. Thus when the United States exercises its power of legislation, state legislation prescribing different rules on the same subject becomes inoperative and the federal legislation is exclusive in its application. (*Napier* v. *Atlantic Coast Line R. R. Co.* 272 U. S. 605 (1926); *Illinois Natural Gas* v. *Central Ill. Public Service Co.*, 314 U. S., 498 (1942).) The very existence of the state act, the Congress having preempted the field by enacting the national act, is, of itself, sufficient conflict to invalidate the state act. (*N. Y. Central R. R. Co.* v. *Bd. of Chosen Freeholders*, 227 U. S. 248; *Houston* v. *Moore*, 5 Wheat., p. 22.)

State monopoly laws have no place in the present situation. Decisions of this Court sustaining such laws did not involve as a specific issue either interstate or foreign commerce or the maritime jurisdiction of the United States. Such cases merely adjudicated the issue of state legislation over intrastate commerce in relation to the 14th Amendment (*Commonwealth* v. *Dyer*, 243 Mass. 472, Cert. Den. 262 U. S. 751). None have dealt with the Clayton Act or labor activities in an interstate and foreign commerce industry. Such latter circumstances are specifically here in issue.

The national policy immunizing labor from prosecution under the Clayton Act, as it concerns these seamen, not only calls for application of the uniformity prerequsite in maritime affairs but also the exercise of that jealous supervision which courts of equity afford such wards of the Court (Pound, Liberty of Contract, 18 Yale L. J. (1909); Commons & Andrews, Principles of Labor Legislation.)

They require protection against over-reaching, for "necessitous men are not, truly speaking, free men, but to answer a present exigency, will submit to any terms that the crafty may impose upon them." (*Lord Nottingham, Vernon* v. *Bethel,* 2 Eden 110, 113; *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op. Assoc.* 276 U. S. 71, 94; *Appalachian Coal Co.* v. *U. S.,* 288 U. S. at 374; *The Osceola,* 89 U. S. 158.)

The fishermen here are merely striving to assure maintenance of their annual wage income. Labor has been permitted to protect itself against demoralization of wages and the evils of cut-throat competition and this by standardization of economic conditions (*Natl. Assoc. Glass Mfrs.* v. *U. S.,* 263 U. S. 463; *Miller Co.* v. *Furn. Workers Union,* 8 F. (2) 209) especially where there is a "unity of interest" between the persons in the same industry. (*Coryell and Sons* v. *Petroleum Workers Union,* 19 F. S. 749.)

The fishermen, unlike those involved in *Columbia River Packers* v. *Hinton,* 315 U. S. 143, are employees involved in a labor dispute. They come within the distinction this Court therein made between employee fishermen to whom prices mean wages and an association of fishermen, the membership of which was composed principally of vessel owners (*U. S.* v. *Local 36,* 177 F. (2) 320), in a price controversy with third party wholesale fish dealers. (*Harrison v. Gray Van Lines,* 331 U. S. 704.) The fishermen are not in the "class" of businessmen. (*U. S.* v. *Local 36,* 177 F. (2) 320; Cert. Den. 339 U. S. 947.)

In the present case all the fishermen are employees; they are company fishermen working on company boats and buying supplies from company stores. The dealer predominantly are the vessel owners. The Union here merely sought unilaterally (R. 1799) and in its own interest to use the minimum price schedule as a pay-off device. "This is not the case of a labor organization being used by a com-

bination of those engaged in an industry as a means or instrument for suppressing competition or fixing prices." (The *Apex Hosiery Case* at p. 510.)

If it should be deemed that this Union did in fact bring about market control and monopolize the supply (*Apex Case* at 512), the Federal Government can be relied upon for appropriate measures. Transportation of "out of state" fish to the local port of landing and distribution even in Massachusetts "is essentially national and not local" in character. There is no intrastate commerce here upon which the State law can fasten.

East Ohio Gas Co. v. *Tax Comm.*, 283 U. S. 465, 470, 472;
Power Comm. v. *E. Ohio Gas Co.*, 338 U. S. 464;
P. U. C. v. *United Fuel Gas Co.*, 317 U. S. 456;
Fed. Power Comm. v. *Panhandle Pipe Line Co.*, 337 U. S. 513.

The Federal Government alone is entitled to act where intrastate activities (R. 1764) effectively control interstate commerce in a local area. (*Manderville Island Farms* v. *Amer. Crystal Sugar Co.*, 334 U. S. 219; *U. S.* v. *Frankfort Distilleries*, 324 U. S. 293; *Wickard* v. *Filburn*, 317 U. S. 11; *U. S.* v. *Yellow Cab Co.*, 322 U. S. 218; *U. S.* v. *Women's Sportswear Assoc.*, 336 U. S. 460.)[35]

It is apparent that the action of the Commonwealth in taking jurisdiction of the present matter is "an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" in passing the national act. (*Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941); *Porter* v. *Lee*, 328 U. S. 246; *P. U. C.* v. *Attleboro*, 273 U. S. 83.)

The Massachusetts Supreme Court indicates desire to

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[35] Mere announcement of price coupled with refusal to sell and action through co-operative or other internal agency are not prohibited by the Sherman Act. (*U. S.* v. *Colgate*, 250 U. S. 300; *F. T. C.* v. *Beechnut Packing Co.*, 257 U. S. 441; *U. S.* v. *Gen. Elec. Co.*, 272 U. S. 476; *Dr. Miles Case*, 280 U. S. 373; *Appalachian Coals* v. *U. S.*, 288 U. S. 334.)

enforce the Sherman Act, but not the Clayton Act. (R. 1806.) It believes that a state may do so, but state courts are not permitted, directly or indirectly, so to assume jurisdiction.[36]

Freeman v. *Bee Machine Co.*, 319 U. S. 448;
General Investment Co. v. *Lake Shore R. R. Co.*, 260 U. S. 261;
Williamson v. *Columbia Gas & Elec. Co.*, 29 Fed. (2d) 198; Cert. Den., 310 U. S. 639;
Contract Transfer Co. v. *Terminal R. R.*, 288 U. S. 469.

The Fisheries Co-operative Marketing Act Supersedes the State Statute

A. The Union as Co-operative: the Administrative Remedy

The Atlantic Fishermen's Union by its very nature is a co-operative. This is a natural consequence arising from the nature of the work methods in fishing. Fishing is co-operative production; fishermen work in crews; a crew is a "ship's company" (*Thorneal* v. *Cape Pond Ice Co.*, 321 Mass. 577). "The Gloucester fishermen were the original co-operative workers in our country." (J. B. Connolly, Book of the Gloucester Fishermen, p. 229.) A crew is a voluntary association under the headship of a captain. In maritime employment, fishing, wrecking, etc., vessels often make common cause of their enterprise to increase efficiency and earning power. (*Baxter* v. *Rodman*, 20 Mass. 435, "Mateship"; *Andrews* v. *Wall*, 44 U. S. 568, "Consortship".)

The Union, in setting up selling rooms (R. 1749, 1759), undertook collective bargaining and orderly marketing of the labor of its members. In seeking price minima it acted for "mutual" help and aid of the membership in expression

[36] Even the States must resort to Federal Courts for Sherman Act violations (Georgia v. Evans, 316 U. S. 159).

of the policies of Sec. 6 of the Clayton Act and Sec. 7 of the National Labor Relations Act. (*U. S.* v. *Dairy Co-operative Assoc.*, 49 F. (2), 475; *Allen Bradley* v. *Local 36*, 325 U. S. at 808.) This could not be done unless industry-wide price information was made available through an organized resource for its publication and assembly. (R. 1749-50.)

The purpose of the Fisheries Co-operative Marketing Act is "to provide for the fishing industry co-operative associations such as are provided for farmers by the Capper-Volstead Act." (1943 House Report No. 1504.)

In the debate on the Capper-Volstead Act, Senator Calders said:

> "They (farmers)[37] are only asking that by affirmative action Congress recognize the principle of collective bargaining." (1922 Cong. Record, Senate Debate, pp. 2217-20.)

It thus appears that the purpose of both Acts was to permit combinations which would control prices with the proviso that if prices were actually unduly enhanced, the situation would be subject to the administrative remedy therein provided.

Fishermen are entitled to the benefits of all Agricultural Marketing legislation. (Agricultural Marketing Act of 1946, sec. 202 (3), 207 of Title II. Public Laws 733, 79th Cong., 2d ses., Aug. 14, 1946.) By such legislation Congress, in sec. 202, provides—"An integrated administration of all laws enacted by Congress to aid the dis-

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[37] Not necessarily land-owning farmers. The Massachusetts Supreme Court believes the benefits of the co-operative legislation should come only to those who have, but not to those who need property. It is not within its imagination that either tenant-farmers or share-fishermen should "co-operate," and this despite the fact that the Court found the Union as possessing a "monopoly of sales" in interstate commerce within the scope of the State Anti-Monopoly Act. The fishermen say the Federal Statute contains no "property qualification" for "cooperation"; it affirms cooperation is a right of free men in economic democracy.

tribution of agricultural products through research, marketing aids and services and regulatory activities." Sec. 207 defines "agricultural products" as including "fish and shellfish." These national plans have no counterpart in the Commonwealth, and General Laws, chap. 93, cannot be said to supplement the national purpose.[38]

Manchester Dairy System v. *Heywood,* 82 N. H. 193;
Liberty Warehouse Co. v. *Burley Tobacco Growers,* 276 U. S. 71.

On the very day that the Court decided *U. S.* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, it likewise decided *Tigner* v. *Texas,* 310 U. S. 141.

In an unreported opinion in *U. S.* v. *Columbia River Fishermen's Protective Assoc.,* No. C-16087 in the District Court of the United States for the District of Oregon, the Court said (C. C. H. Trade Reg. Service 1941-43 Ct. Decision 52917):

> "This case turns on the narrow question whether agreement on an opening minimum price to be paid for fish becomes unlawful when negotiated by the Fishermen's Union, which I will treat as a co-operative, with the packers as a group rather than by negotiation with the packers individually. While *U. S.* v. *Socony-Vacuum,* 310 U. S. 150, would seem to require such holding as to the ordinary commercial transaction, I feel that the recognition given by modern federal statutes and decisions to the special and peculiar marketing problems of producers, including commercial fishermen, justified me in holding that the practice of group bargaining, which has been so satisfactory on

[38] The Massachusetts Supreme Court misconstrues *U. S.* v. *Borden Co.,* 308 U. S. 183, for therein, unlike here, there was a vertical combination between milk producers and wholesale dealers and others. Our situation is purely a horizontal association of employees. Likewise it distorts the meaning of the *Columbia River Packers Assoc.* v. *Hinton* case, for there, too, there was a combination on two levels, boat owners and employees, to fix prices to third parties.

> the Columbia River to fishermen as well as canners, is not subject to the criminal penalties of the Anti-Trust Act."

An association clearly may qualify under the provisions of the Fishermen's Marketing Act by engaging in any one of the permitted activities set forth therein—that is, by engaging in marketing alone by provision of selling rooms. Or an association may qualify under the Fishermen's Marketing Act by functioning merely as a bargaining agency for price, as the Union sought to do. An association of fishermen, which engages in bargaining collectively for prices and terms and conditions under which its members shall market their fish, is a collective marketing agency. The term "collective marketing" is, of course, suggestive of collective bargaining. *Johnson* v. *Georgia-Carolina Retail Milk Producers Assoc.*, 182 Ga. 659.

The selling rooms at Gloucester and New Bedford set up for collective bargaining of wage-prices are facilities for the disposal and pricing of the labor product of fishermen.[39] They are wage contract markets seeking the money valuation of the wage-goods or products of the fishermen. (*Chicago Bd. of Trade* v. *U. S.*, 246 U. S. 231.) (See R. 1749-50, 1762.) The Union, as part of normal operations, merely provides facilities for members and such third persons as resort thereto. (*Turner* v. *Chicago Bd. of Trade*, 244 F. 108, Cert. Den., 245 U. S. 667; *U. S.* v. *New York Coffee & Sugar Exchange*, 363 U. S. 611.)

Obviously, market appraisal of labor as a commodity means bargaining with respect to prices as the matrix of the wage. That is why the price schedules desired as a measure of minimum wages of the fishermen was announced by the Union.

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[39] See Labor-Management Relations Act of 1947, sec. 2 (5), "Labor organization" . . . "in whole or in part".

The Fisheries Cooperative Marketing Act supersedes the State legislation. The Act is a comprehensive piece of legislation for the regulation of co-operatives in interstate and foreign commerce as such originates on the High Seas. The statute contains the exclusive remedy binding on all, except perhaps the United States itself should it care to proceed under the Sherman Act in cases of combination between producers and dealers. (See Fisheries Cooperative Marketing Act, 15 U. S. C. Sec. 522.)

Ruzicka v. *U. S.*, 329 U. S. 287;
U. S. Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474;
Myers v. *Bethlehem Shipping Corp.*, 303 U. S. 41;
U. S. v. *Alkali Assoc.*, 325 U. S. 196.

This federal legislation clearly demonstrates a national plan in keeping with the policy of uniformity so typical of admiralty and maritime jurisdiction, for otherwise, "if the power existed in both courts and the Commission to originally hear complaints on the subject, there might be a divergence between the action of the Commission and the decision of the Court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a Court acting originally and thus a conflict would arise which would render the enforcement of the Act impossible."

Texas & P. R. Co. v. *Abilene Co.*, 204 U. S. 426 at 441;
Keough v. *Chicago N. W. R. R. Co.*, 260 U. S. 156.

As the United States Supreme Court has put it in the case of *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218:

> "We recently noted that Congress can act so unequivocally as to make clear that it intends no regulation except its own. (*Bethlehem Steel Corp,* v. *N. Y.*

L. R. B., 330 U. S. 767). The test therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails, though it is a more modest, less pervasive regulatory plan than that of the State."

True not only with regard to the Cooperative Act, but also the Sherman Act as modified by the Clayton Act.

Obviously, the State statute conflicts with this Federal Act.

Fishermen Are Employees: Prices Are Wages

Members of fishing crews, captains and fishermen, are employees of the vessel owner. (Exh. 9.) Their employment is "directly related to the use of the vessel, at sea" and "they are governed by maritime and not state law."[40] The employment relationship is not changed even though a vessel catch is permitted to be sold to non-vessel-owning dealers—the sales price going to the boat owner. An employment relationship exists even though the employees look elsewhere than to the employer for compensation. (*Walling* v. *Portland Terminal Co.*, 330 U.S. 148.)

These fishermen are not sellers "on their own account," (R. 1807-08) or persons "self-employed" (*Columbia River Packers Assoc.* v. *Hinton*, and *U. S.* v. *Local 36, supra; Metcalf-Eddy* v. *Mitchell*, 269 U.S. 514, 521). They but perform work which comprises an integral part of the business of another. (*Rutherford Food Corp.* v. *McComb*, 331 U.S.

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[40] *Thorneal* v. *Cape Pond Ice Co.*, 321 Mass. 528, 532.
Nolan v. *General Sea Foods Co.*, 112 F. (2) 515.
Osland v. *Standard Fish & Oyster Co.*, 107 F. (2) 113.
Stevens v. *R. O'Brien Co.*, 62 F. (2) 632.
The Carrier Dove, 97 F. 111. (Fishermen do not have the right to select agent for sale of catch.)
Cromwell v. *Slaney*, 65 F. (2) 940. (Captain receiving share of vessel owner's share is employee.)
Union Fish Co. v. *Erickson*, 248 U. S. 308. (Fishermen are seamen.)
Burns v. *Fred L. Davis Co.*, 271 F. 439.
Aguilar v. *Standard Oil Co.*, 318 U.S. 724, 732 (vessel "is the framework of their existence").

722;[41] *U.S.* v. *Rosenwasser,* 323 U.S. 360.) The fact that the payment asked for fish is called a "price" instead of "wages" does not convert it from payment for expenditure of human labor to a return upon capital.[42]

Fishermen are not "sellers" for they have no investment in the vessels. (*U. S.* v. *Silk,* 311 U.S. 704, 719; *Columbia River Packers Assoc.* v. *Hinton,* 315 U.S. 143; *Milk Wagon Drivers Union* v. *Lake Valley Farm Products,* 311 U. S. 91; *Hunt* v. *Crumboch,* 325 U. S. 821; *U. S.* v. *Local No. 36,* 177 F. (2) 320; *Harrison* v. *Grayvan Lines, Inc.,* 331 U. S. 704.) No vessel-owning captain or other vessel owner is a member of the Union here. (Exh. 27.) (See page 5, Sup.)

As employees, naturally, fishermen work for wages. (*The City of Avalon,* 156 F. (2) 501; *The General Lincoln,* 24 F. (2) 441; *Pacific American Fisheries* v. *U. S.,* 138 F. (2) 464.) What the fisherman produces may be termed wage-goods. (*U. S.* v. *Laflin,* 24 F. (2) 683.) This peculiar but not unique wage system indicates that one must distinguish between the method of pay and pay. Both need to be interpreted in the light of customs, systems of labor and working conditions peculiar to the industry. Under the share system, the fishermen are "directly interested in the profits of the voyage."

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[41] "Sale" and "price" as the Massachusetts Supreme Court uses such terms are equivocal. Such words are not "self-defining." They are guilty of "penumbral meaning." (*U. S.* v. *Spelar,* 333 U. S. 611.) As used, they "foreclose the real questions of law" and make "constitutional adjudication a verbal game." (*U. S.* v. *Filen,* 334 U. S. 624, 639.) Hence, the need to emphasize the employer-employee relationship—the "sale" and the "price," cannot be divorced from such matrix. (*Allen Bradley* Case, 325 U. S. 797 at 807, note 11.)

[42] Where people work in terms of a product they speak of the value of their labor in terms of price. (*Schrandt* v. *Young,* 62 Neb. 255—Woolshare; *Penn. Mutual Co.* v. *Costello,* 33 Pa. 241—Miners paid on tonnage basis; *Thompson* v. *Passmore,* 9 Ga. App. 771; *Hermitage* v. *Cotton Mills,* 98 S. C. 414; *Employers Mutual Ins. Co.* v. *Ind'l. Comm.,* 74 Colo. 201—Sharecroppers; *Berry* v. *Woodburn,* 107 Cal. 504, and *Stuart* v. *Adams,* 98 Cal. 367—Gold miners on shares. See *People* v. *Gassman,* 295 N.Y. 254; *N. Y. Clothing Exch.* v. *Textile Finishers Assn,* 238 App. Div. (N.Y.) 14.

(*Knight* v. *Parsons,* 140 F. Cases No. 7886.) This interest in the gross earnings is linked up with the "market" price of fish. This direct interest in profits—in the money realization of the fishing trip—entitles the fishermen to have "such part of the catch as will satisfy their demands" sold for cash. (*Bourne* v. *Smith,* 3 F. Cases No. 1701; *Crowell* v. *Knight,* 6 F. Cases No. 3445; *Barbara Hernster,* 64 F. 732; *Cape Horn Pidgeon,* 45 F. 164; *The Hunter,* 47 F. 744; 46 U.S.C., Title 17, sec. 531; *Bishop* v. *Shepard,* 23 Pick. 492.)

The accounting procedure to calculate the money value of the fishermen's share is known as the Lay. "It is the mode of arriving at their wages." (*The Antelope,* 1 F.C. No. 484; *Reed* v. *Cantfield,* 20 F.C. No. 11641.) "The shares agreed upon are the wages and are recoverable as such." (*Reed* v. *Hussey,* 20 F. Cases No. 11616; *Baxter* v. *Rodman,* 3 Pick. 435.) The fishermen's earnings "are to be treated as wages whether the compensation was to be made in kind or money."[43] (*Bourne* v. *Smith,* 3 F. Cases No. 1701.)

The fisherman is daily on the auction block for market valuation of himself as a human in terms of a commodity—fish. Only as we unfold the sales transaction by the accounting of the avails is the fishermen's wage share, as an inlay, discovered and determined. This wage-price identity is so organic in its double unity that it may be said that the wage is in the womb of the price, and in the behavior of the price is the birth of the wage; and only by price sale and trip settlement is this viable wage individuated. Hence the need and right of fishermen to participate in wage-price formation in all its prenatal states and this, if desired, through standardization of pay-off minimum wage-prices by

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[43] Regulation of Fisheries Act (46 U.S.C. 531) controls "share" fishermen employment contracts, and the state statutes and decrees as they regulate price-earnings conflict with such federal statute. Fishermen Agreements thereunder are now Collective Bargains. (Exh. 9, 28.) The state statute and the decrees likewise regulate sea-going enrolled U. S. vessels (1 U.S.C., sec. 3; Enrollment of Fishing Craft Act, 46 U.S.C. 251, 363, 325)—a power long forbidden to states.

Union action. (A. C. Pigou, The Economics of Welfare, 4th ed., p. 43; J. R. Hicks, Value and Capital, *passim.*)

The Labor Disputes Are Within the Coverage of Sec. 6 of the Clayton Act and the National Labor Relations Act

Examination of the Collective Bargain Agreement in Boston (Exh. 9, Article 20 (b) R. 1045) discloses that:

> "Nothing in this agreement shall be deemed to limit, restrict, waive or otherwise adversely affect in any manner the rights, privileges and action of the Union or any of its members which it or they may be entitled to under or pursuant to State or Federal law; other specific provisions of this agreement shall not be deemed to apply to or adversely affect the matters so herein reserved and excluded from this agreement . . . ."

Such Federal Law includes the Sherman Anti-Trust Act, as amended and as correlated with the Norris-LaGuardia Act—so it was intended. (*U. S.* v. *Hutcheson,* 312 U.S. 219.) (R. 1402, 1725; Exh. 25, pp. 415-8.)

An Arbitrator's Award (in re *General Sea Foods Corp., et al.* v. *Atlantic Fishermens Union,* M. Copelof, U. S. Dept. of Labor, May 20, 1947) points this up.

It ruled that "The provision quoted (as above) was provided to enable the fishermen to take unilateral action concerning the protection of their wages which emanate from the sales price of the catch in which they have the major share of the returns."

"Since apparently the Company and the Union were aware at the time this contract provision was agreed upon that the Union had the right to decline to accept a price for the fish which was unsatisfactory to it, ... the question seems to be whether the fishermen refused to unload after a bona fide sale, or whether they refused to accept a price which had not resulted in a sale, and therefore the unloading of the catch under the circumstances was not a requirement under the contract."

"The Arbitrator is bound to find that in view of the so-called price war which was going on at the time, that a fair sale had not been consummated, and therefore the unloading of the fish did not become a requirement under the contract." (*Somerville* v. *The Francisco,* Fed. Cases No. 13170.)

This arose from and involved the Boston Fish Pier Episode. (*Members* v. *Hall Baking Co.,* 320 Mass. 286.)

When disputes arose in Gloucester over proper calculation of the wage in terms of weight and deduction for ice and trash (Exh. 27, R. 1711), and in Boston over the wage-stabilization minimum—the support wage—labor disputes arose—"their spur to action" being "related to wages and working conditions." (*Allen Bradley Case,* 325 U.S. 797, 807, note 11.)

A. The Gloucester Episode.

The controversy between Gorton-Pew and the three vessels' crews, two of which vessels were owned by Gorton-Pew, revolves around the company's attempt to change a condition of employment. The condition was a weighing-out rule as such affected the amount of the wage. (R. 1146-51.) It is comparable to the weighing-out practice in the mining industries, especially in the coal mining industry where many miners work on a tonnage basis and screen coal in order to arrive at the wage. (Pound, Liberty of Contract, 18 Yale L.J.) (R. 706-9, 777-9, 850.)

Once Gorton-Pew put its own rule into effect without disclosure to the Union, as bargaining agency, the Union was entitled to act. It may refuse its facilities. (*People* v. *Chicago Bd. of Trade,* 80 Ill. 134; *Moffat* v. *Kansas City Bd. of Trade,* 111 S.W. 894; *Crowley* v. *Commodity Exchange,* 141 F. (2) 182.) This right was reinforced by the Standard Gloucester Dragger Contract (Exh. 27) which provides that no vessel owner shall require the landing of catches where there is "labor trouble." (R. 847-8, 902.)

B. The Boston Fish Pier Episode.

The largest dealers and boat owners on the Boston Fish Pier include Gorton-Pew, General Seafoods Corp., a division of General Foods, Booth Fisheries, and Atlantic Coast Fisheries.[44] All these companies have plants in Canada and they export fish to the United States. In Boston the handy device working to assure acquisition of material at low cost is the "sell-over" process. (R. 1762.) The prices themselves always followed a "price pattern" set by the largest buyers whose bid price became the uniform daily market price in all ports. As the Court found, "the price brought by the first trip sold is quite likely to set the price pattern for that day on the same kind of fish in all the branches." (R. 1751.)

Union success in enforcing its minimum wage stabilization measure endangered the sell-over process, for no longer could it be unrestrainedly used to assure cheap raw material and low labor cost. (R. 999, 1084, 1054, 1087.) Union success likewise would blunt one prong of the International pincer which the four big companies sought to apply.[45] Union success would stop the transfer of the cost of the market "squeeze" (R. 849, 946-7) due to foreign low-wage competition to the shoulders of the fishermen.

Obviously both episodes are labor disputes.[46] This is made more clear by the fact that webbed in with these economic purposes are the following unilateral activities

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[44] General Foods and Booth between themselves own the patents for food freezing and thus hold the industry in close grip. This is "bilateral monopoly" (Investigation of Concentration of Economic Power, Temp. Natl. Economic Committee, Monograph 35, Large Scale Organization in the Food Industries, pp. 54-7, 77-88, 129-32). General Foods owns and operates 16 of the 35 beam trawlers (Exh. 9).

[45] Volume of Imports—See Bureau of Census Monthly Reports, No. FT-110, U. S. Imports of Merchandise for Consumption; U. S. Dept. of Interior, Vol. 8, No. 2, Commercial Fisheries Review, Feb. 1946, Imported Fish: A Major N. E. Problem, W. C. Herrington.

[46] Even though the Court below is not "familiar" with such (R. 1806), its lack of knowledge of labor economy and history is no justification.

for improvement in conditions of employment, to wit:—shortening of work-time by shorter trips permitting more time ashore and better prices for quality of fish. (R. 1761-3.) Interlaced also are the following (R. 1639-50):

1. Concern over a disappearing source of work. (R. 1645.)

2. Concern over the returns therefrom.

3. Concern over increased trip expenses incident to resort to more distant fishing grounds. (R. 1664-5.)

This Court in *Apex Hoisery Co.* v. *Leader*, 301 U. S. 469, 530, has stated:

> "Since in order to render a labor combination effective it must eliminate the competition from non-union made goods, the elimination of price competition based on differences in labor standards is the objective of any national labor organization."

This Union in no way sought to advance the employer's interests, but rather its own. "So long as a Union acts in its own self interest and does not combine with non-labor groups the Courts do not pass upon the selfishness of the end to which the particular activities are the means." (*U. S.* v. *Hutcheson*, 312 U. S. 219; *U. S.* v. *C. I. O*, 335 U. S. 106, 147.)[47]

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[47] The Court below (R. 1807) stated that these "controversies arose, not over employment, but over sales to buyers." It was faced with a trap of fact, an admitted employee relation (R. 1807-8). What to do to fit the situation within some of the verbal framework of the cited *Hinton* case? Make no mention of the identity of the "buyers" as vessel owner employers! The word "buyers", without definitional designation, is equivocal and, in its context, not "self-defining." (*U. S.* v. *Spelar*, 333 U. S. 611.) This is fact-finding absent that "judicial judgment" to which this Court is entitled for its full information. (*Erie R. R. Co.* v. *Puruska*, 244 U. S. 324.) That is a trap of the law. Such findings so over-simplified (and so unjust) lack the "precision necessary for the postulates of judicial reasoning." (*W. Va. Bd. of Education* v. *Barnett*, 319 U. S. 624, 636.) This calls for independent review by this Court both of the "legal issues and those matters with which they are commingled,"

U. S. v. *Carroza*, 313 U. S. 539;
U. S. v. *International Hod Carriers*, 313 U. S. 539;
U. S. v. *Building & Construction Trades Council*, 313 U. S. 539;
U S. v. *Amer. Fed. of Musicians*, 318 U. S. 741;
U. S. v. *Bay Area Painters Council*, 49 F. Supp. 733;
U. S. v. *Brotherhood of Carpenters*, 330 U. S. 395;
Hunt v. *Crumboch*, 325 U. S. 821.

The Final Decree Abridges Privileges and Immunities of the Fishermen as Citizens of the Several States: It Denies Them the Equal Protection of the Law.

The Decrees, preliminary and final, violate the Federal Constitution, Article IV, Section 2, which provides that "The Citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States." Likewise such Decrees violate Article XIV of the Federal Constitution which commands that "No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States." Such Article XIV further states that no State shall "deny to any person within its jurisdiction the equal protection of the law."

There are Union Fishermen who come from outside the Commonwealth and who fish on vessels registered in Customs Houses located outside the Commonwealth. They frequently land their catches in Massachusetts Ports (for instance, the Maine and Southern Fleets). Their conduct on the High Seas is not subject to the regulation of the Courts of Massachusetts. The volume of catch brought in by, let us say, the Southern Fleet, or some of the New York Fleet, or some of the Connecticut Fleet, or some of the Maine Fleet, in and of itself is sufficient, unless immunized,

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for otherwise "constitutional adjudication becomes a verbal game." (*U. S.* v. *Filen*, 334 U. S. 624, 639.) (See p. 9, *supra*, for percentage of employing vessel owner-dealer buying power as compared with that of small minority of non-vessel owning dealers.)

to be a subject of Federal regulation (*U. S.* v. *Yellow Cab Co.*, 332 U. S. 218; *U. S.* v. *Frankfort Distilleries*, 324 U. S. 293; *Swift & Co.* v. *U. S.*, 196 U. S. 375), "so long as control is exercised effectively in the area concerned" (*Mandeville Island Farms* v. *Amer. Sugar Co.*, 324 U. S. 219, 236). Surely such persons are not subject to the Decrees aforementioned. Surely they are entitled to the privileges and immunities of the Federal Anti-Trust Legislation (*U. S.* v. *Hutcheson*, 312 U. S. 219; *Takahashi* v. *Fish & Game Comm.*, 334 U. S. 410; *Toomer* v. *Witzell*, 334 U. S. 385) applicable to employee fishermen. The Massachusetts fishermen do not have the benefit of equal protection of the laws.

This is made apparent by practical situations. Many Massachusetts fishermen shift to vessels sailing out of out-of-state ports. How are they to act when non-Massachusetts fishermen with whom they work in any particular crew care to engage in production limitation on the High Seas? It often happens that Massachusetts fishermen may work on one of the two rotating shifts and the other shift is composed of non-Massachusetts fishermen. Will the Massachusetts fishermen be guilty of contempt should the other members of the crew engage in production limitation?

Certainly here, the policy of uniformity and of harmony called for in foreign relations, foreign commerce, and the compulsion of the maritime jurisdiction must find place within the privileges and immunities of the Federal Constitution.

The distortion of these national policies re-emerges when Massachusetts residents engage in High-Seas job-load regulation or enforcement of minimum prices at ports outside of Massachusetts. For on re-arrival in Massachusetts, such fishermen may be subjected to contempt proceedings. The situation then is this: On departure from the fishing grounds to ports outside of Massachusetts, the Massachu-

setts fishermen gain freedom from the Decrees, subject, however, to reattachment of subjection thereto on return to Massachusetts. That is to say, the Decree "puts the liberty of a man as it were into a parenthesis." (*Polydore* v. *Prince,* 1 Ware, U. S. D. C. Me. 410.) One would assume that universality and uniformity of freedom on the High Seas and in the United States would follow of course and that price bondage would no more exist than slavery. (*Prigg* v. *Pa.,* 16 Peters 614; *Dred Scott* v. *Sandford,* 19 Howard 393.) This bifurcation of status, depending on locality, will characterize the fishermen. That is why it is well to accommodate the situation here within the confines of "generally applicable" constitutional limitation. (*Toomer* v. *Witzell, supra,* at 394.) Otherwise confusion will rule in that the Commonwealth will dole out its own law in accordance with its own views of policy and expediency. Such a conflict justifies the policy of Congress (as expressed by the decision in *U. S.* v. *Hutcheson, supra*) and the inherent nature of Federal Maritime Jurisdiction, as best expedient and legally paramount.

The Final Decree Embodies Compulsory Arbitration of Work and Wages: Its Impressment of Fishermen Is Involuntary Servitude and Denial of Constitutional Liberty.

The Decrees, preliminary and final, violate Article XIII of the Federal Constitution in that they impose involuntary servitude. They violate Article XIV of the Constitution in that they deprive the Union and members of life, liberty and property without due process of law. Likewise they conflict with Section 6 of the Clayton Act, which commands: "That the labor of the human being is not a commodity or article of commerce."

The fishermen work under a wage system where payment depends on work results. Since the wage is a quotient

of the "gross stock" after lay calculation (R. 1752), a decree which commands continuation of a particular wage-price mechanism regulates one of the ingredients of the wage variable here under consideration. A decree which, in effect, *forbids change* in wage process as, for instance, by the introduction of a minimum or floor price in an employer-employee relation, regulates the wage system.

The decrees confine and harness wage process to commodity market price movement—free of the need to be concerned with "probable social consequences" or "intrinsic worth" of human beings, a concern whereby, as Judge Cardoza admonished (*Campbell* v. *City of N. Y.*, 244 N. Y. 317, 329), "there would be no merciless exploitation of the indigent."

The decrees do this in face of the fact that the fishermen are not seeking to compel their employers to fix resale price. The Findings of Fact disclose that "It is a matter of indifference to the defendants what the buyers do with their fish" (R. 1764) once bought.

The Massachusetts Court intimates that fishermen who work on a share basis should confine themselves solely to changes in the percentage division of the lay. Courts normally hesitate to delimit the nature or variety of wage systems, for wage systems are not absolutes—they are compromises with economic institutions (A. G. Pool, Wage Policy in Relation to Industrial Fluctuations; Z. Clark Dickinson, Collective Wage Determination.)[48]

It is unrealistic to say that only percentages may be increased when the price of fish (the subject to which the percentage measure is applied and without which the share cannot be determined) sinks, possibly to next to nothing. Fishermen in employee relation work not for an accounting device, a rate, a percentage measure; they work for

[48] The British Trawler Industry works under a system as here sought by the Union. See aforementioned 1946 Court of Inquiry Report (p. 16).

a percentage of a price, that is, for wages. The percentage without the price is a vacuum. Fishermen should not be forced to be content with an increasing percentage of near-zero.

Regulation of wages and its forms by judicial fiat is compulsory arbitration of wages—this irrespective of the fact that labor value, as here, is gauged by the semantic dimension labelled "price." Courts frown on the "mechanical application" and hypertechnical use of words (*Ford Motor Co.* v. *U. S.*, 333 U. S. 611); for "logic must yield to realities" (*Callow* v. *Thomas*, 322 Mass. 550, 555; *Macallan* v. *Mass.*, 279 U. S. 620).

Similarly, to the extent that the decrees regulate production by requiring no limitation on human fishing effort, they operate to control the quantum of work or job-load. All other workers are entitled to decrease their work time and work load, and knowingly to do this in order to affect, even by increase thereof, the pay therefor (Exh. 25, pp. 415-8), (1 Teller, Labor Disputes and Collective Bargaining, sec. 85; Slichter, Union Policies and Industrial Management). The fishermen, by engaging in production regulation as webbed in with conservation, are motivated with similar purpose.

The decrees, therefore, as they touch both on wages and related work-stint practice are violative of the aforementioned provisions of the Constitution; and also Section 6 of the Clayton Act. (*Woolf Packing Co.* v. *Ind. Ct. of Kansas*, 262 U. S. 522, and 267 U. S. 552; compare *Wilson* v. *New*, 243 U. S. 133.)

The Final Decree Abrogates Freedom of Association

The Final Decree forbids the fishermen from "combining" to achieve minimum or other wage-prices on sale of fish. The Decree states the fishermen are restrained from "fxing a price or prices below which fresh fish will not

be sold; but nothing herein shall be construed to prevent individual captains and separate crews, acting independently from other captains and crews, from selling particular catches at the highest prices obtainable therefor."

This Decree thus forbids extension of "co-operative marketing" and collective bargaining for "prices" as an ingredient of wage settlement. It sanctions only "atomized individual rule and action." (*U. S.* v. *C. I. O.*, 335 U. S. 106, 107.) A Court should not contain a dispute between employers and employees to such narrow field as to exclude employees with a community of interest. (*Cafeteria Employees* v. *Angelos*, 320 U. S. 293). Here it is apposite to say "when the master can compel and the laborers cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." (*Pollock* v. *Williams*, 322 U. S. 18.) The fishermen will be made to know that the "ethical and social elements" which have contributed to "the development in the law of the 20th century have become "the contentless content of formal juridical logic." (Griswold, Law and Justice in Our Society, Harvard Alumni Bulletin, Jan. 14, 1950; Frankfurter and Greene, The Labor Injunction; 1 Teller, sec. 60, 64—Labor Disputes and Collective Bargaining.)

The Decree only permits collective bargaining or strike for economic change—it forbids all other unilateral action. The fishermen are entitled to freedom of association in wage bargaining and the right, in view of the physical, biological and market hazards of their calling, and the distances from home ports, to undertake "other concerted activities" "for mutual aid and protection" by unilateral action [49]—and this without need for strike or collective bargaining.

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[49] Certainly for conservation of marine resources and job preservation.

Obviously the Decree violates the Federal Constitution (Art. IV, Sec. 2, Clause 1, 13th and 14th Amendments). It violates Section 6 of the Clayton Act, the Fishermen's Co-operative Marketing Act, and the National Labor Relations Act (Sec. 7).

The Final Decree Lacks Precision of Injunctive Command; It Acts In Terrorem

The Supreme Judicial Court of Massachusetts, on appeal, recognized the "indefiniteness" of the Final Decree of the Superior Court. Nevertheless, the Petitioners were held in contempt of court for violating such decree so found to be erroneous. This is a denial of due process.

The Court modified the Decree by deleting the vague standard of "fair market value" but substituted therefor the much more vague standard of "free and fair market." The jungle of literature purporting to analyze the meaning of "free and fair market" is no comfort to the fishermen as they are forced to comply. The fishermen are up against a decree of troublous ambiguity. They cannot be expected to determine the meaning of such words when even this Court has difficulty in determining the meaning of the words "fair and equitable value" with the aid of a fact-finding "expert" Commission (*S. E. C.* v. *Central Ill. Corp.*, 338 U. S. 96).

The Decree therefore carries with it "overhanging threats of future punishment" (*Thornhill* v. *Ala.*, 310 U. S. at 10). The Decree acts *in terrorem*.

Ex parte Young, 209 U. S. 123;
U. S. v. *Evans*, 334 U. S. 483.[50]

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[50] The Court below stated "it must be recognized that there are great difficulties in drafting a satisfactory decree in a case of this kind." (R. 1812.) But the fishermen are entitled to a specific decree. (*Hartford-Empire Co.* v. *U. S.*, 324 U. S. 570; 332 U. S. 386; *W. Va. Bd. of Education* v. *Barnett*, 319 U. S. 624.)

The Bill of Complaint Was Dismissible by the Federal District Court

Justice Healey of the State District Court for the District of Massachusetts pointed out the cause was not removable because the Federal Court, under the then Removal Statute,[51] may only take jurisdiction if the State Court also had jurisdiction. This was conceivable cause for remand. Justice Healey implied (*Mass.* v. *McHugh,* 71 F. S. 516) the State Court could not intervene in admiralty and maritime affairs and where foreign and interstate commerce have been placed in the exclusive jurisdiction of the Federal Courts by Acts of Congress.

The Federal Court, nevertheless, should have retained the record and the petitions for removal and once and for all completely disposed of the matter by dismissal of the State proceedings. (*General Investment Co.* v. *Lake Shore Ry.,* 260 U. S. 261; *Metropolitan Cas. Ins. Co.* v. *Stevens,* 312 U. S. 562; 2 Cyc. of Fed. Procedure (2d ed.), sec. 518; *Pocohantas Term. Corp.* v. *Portland Building & Construction Council,* U. S. District Court (District of Maine, Southern District, Case No. 738 Civil, Sept. 21, 1950.) This issue under the former Removal Statute can only be reviewed after exhaustion of the State Courts and thus, it is submitted, there is ground for writ of certiorari.

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[51] As it existed before the Act of June 25, 1948, 62 U. S. Statutes at Large, 869.

Conclusion

Upon all of the grounds herein stated, the Petition herein, it is submitted, should be granted and, after hearing, the decision below should be reversed and appropriate relief granted.

With respect,

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